No. 3585

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN TRADING COMPANY
(a corporation),
Plaintiff in Error,

vs.

A. T. STEELE,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

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Statement of Case.

This is a writ of error from the United States Court for China. The action is one for damages for alleged breach of contract. Defendant in error, who was the plaintiff in the court below, had judgment against the plaintiff in error (defendant in the court below) for the sum of $7500. Throughout the discussion we will refer to the parties as they were ranged in the trial court.

The action grew out of the alleged breach by the defendant of a contract made in San Francisco on May 27, 1918,[1] whereby the defendant employed the

1. R. 29.

plaintiff as chief accountant for its Shanghai office for a term of three years to commence on the date when the plaintiff should leave San Francisco to assume his duties under the contract, but in all events not later than July 1, 1918. The compensation provided in the contract for the three-year term was $10,000.00.

The contract is in the form of a letter addressed to the plaintiff and confirmed by him, and, among other things, contains a provision as follows:

> "*Satisfactory Service:* The undertakings herein contained on our part are all *conditioned upon your doing your work in an efficient and satisfactory way.*"[2]

Plaintiff sailed for Shanghai on August 9, 1918,[3] to take up his duties under the contract. While on his way to Shanghai, he was stopped at Yokohama by a wireless from the defendant and requested to proceed to Tokyo, there to assume temporarily the duties of chief accountant at defendant's Tokyo office during the absence of the regular accountant.[4]

On arriving at Tokyo, the plaintiff received from the defendant a letter dated August 27, 1918[5] and approved by the plaintiff.

The letter made provision for the term of plaintiff's employment in Tokyo and his compensation, and constituted a modification of plaintiff's original contract in respect of (a) the place of employment, i. e., Tokyo

2. R. 30.
3. R. 45.
4. R. 45, 46, 125, 172.
5. R. 31.

for the time being, rather than Shanghai, and (b) plaintiff's compensation during part of the three-year term, i. e., that covered by the employment in Tokyo. The original contract remained unaltered in all other respects. With reference to the term of plaintiff's employment in Tokyo the letter of August 27th provided that it should be while the regular accountant was absent on vacation, a period estimated in the letter at about six months.[6] The letter provided that the term of employment in Tokyo should be deemed to be a part of the three-year term covered by the original contract executed in San Francisco,[7] and made certain monetary allowances to the plaintiff to compensate for increased inconveniences to which he might be subjected by reason of the temporary change in his location and plans.[8]

His employment incepted under the foregoing circumstances, the plaintiff continued to work at the defendant's Tokyo office until May 3, 1919.[9] The regular accountant for whom the plaintiff was substituting returned to Tokyo on April 30, 1919,[10] and on the next day the plaintiff commenced to hand over to him the management of the accountant's department, a process which was completed on May 3rd when plaintiff's connection with the office ceased;[11] the plaintiff had been employed in the Tokyo office a little over eight months.

6. R. 32.
7. R. 32.
8. R. 32.
9. R. 47.
10. R. 47.
11. R. 47.

Shortly before March 19, 1918, and while he was still employed in the Tokyo office, the plaintiff, for reasons that will presently appear, was informed by the defendant that his services would not be required at the defendant's Shanghai office.[12] In the meantime the defendant had arranged to retain the incumbent accountant at Shanghai, whom it had been its intention to replace by the plaintiff.[13]

Thereafter, a question arose between the plaintiff and the defendant as to the liability of the latter on the contract made in San Francisco. The plaintiff asserted that the defendant had breached said contract. Defendant took the position that plaintiff's services in the Tokyo office were not "satisfactory", that plaintiff was insubordinate and disregarded office hours and rules and that it was justified in discharging him because he had breached the condition of "satisfactory service" contained in his contract of employment.[14]

The parties finally agreed to submit their dispute to arbitration. The matter was submitted to arbitration and the arbitrator by his decision refused to grant to the plaintiff any relief based upon his contract made in San Francisco. The decision of the arbitrator was:

> "that the matter of the three-year contract should be referred to Mr. Ward in San Francisco for settlement".[15]

12. R. 52.
13. R. 52, 33.
14. R. 116 et seq.
15. R. 39.

Mr. Ward referred to in the arbitrator's decision was the person representing the defendant and had negotiated the plaintiff's contract of employment.[16]

The plaintiff refused to abide by the decision of the arbitrator and commenced suit in the United States Court for China, alleging that the defendant had breached his contract by dismissing and discharging him without cause on March 19, 1919.

In its answer, the defendant, among other things, alleged that the services rendered by plaintiff while in its employ were neither satisfactory nor efficient as required by plaintiff's contract, and that the plaintiff in the performance of his duties under the contract was inefficient, negligent and insubordinate to his superiors.[17]

The plaintiff, although he filed a replication to the answer,[18] made no denial of the allegations just mentioned. Thereupon the plaintiff moved for judgment on the pleadings.[19] The court denied the motion, and the cause thereupon proceeded to trial, after which judgment was rendered by the court in favor of the plaintiff in the sum of $7500.00.[20] From the judgment so rendered, the defendant prosecutes a writ of error to this court.

In rendering judgment for the plaintiff, the trial court held as follows:

16. R. 30.
17. R. 27.
18. R. 28.
19. R. 191.
20. R. 152, 164.

[1] The letter of August 27, 1918, constituted a contract separate and distinct from the original contract of May 27th[21] and was not subject to the condition of "satisfactory service" contained in the latter contract,[22] and the earlier contract could not be terminated because of "unsatisfactory service" under the contract of August 27th.[23]

[2] The reasons given to the plaintiff at the time of, his discharge did not include any expression of dissatisfaction with his services, and the defendant was precluded from thereafter urging "unsatisfactory service" as a reason for plaintiff's discharge.[24]

[3] The grounds of defendant's dissatisfaction with the plaintiff were unreasonable and were not such as justified the defendant in being dissatisfied with plaintiff's services.[25]

[4] The defendant was not entitled to judgment on the pleadings for the reasons that [a] under the rules of pleading obtaining in the United States Court for China, a plaintiff is not required to reply to affirmative allegations of an answer, but said allegations are "deemed" denied,[26] and [b] the affirmative allegations of "unsatisfactory service" in defendant's answer were too vague and indefinite to require a reply even though the rule of pleading obtaining in the court required a replication to affirmative allegations of an answer.[27]

21. R. 144.
22. R. 145.
23. R. 145.
24. R. 150.
25. R. 150.
26. R. 152.
27. R. 151. 152.

[5] The award of the arbitrator relied upon by the defendant was void and of no legal effect because it did not in fact decide the matters submitted to the arbitrator.[28]

[6] The measure of plaintiff's damages was the compensation at the contract price for the *entire unexpired term of the contract* and not merely for that portion of the term which antedated the date of trial.[29]

The propositions which we shall seek to establish follow:

1. The defendant did not breach its contract with the plaintiff, because it was authorized by the contract to dismiss him whenever in its opinion his services were unsatisfactory or whenever he ceased to do his work in an efficient and satisfactory way, of which facts the defendant was the sole judge.
2. In its answer the defendant alleged that the services rendered by the plaintiff to the defendant were neither satisfactory nor efficient, as required by the contract, and that the plaintiff in the performance of his duties under the contract was inefficient, negligent and insubordinate to his superiors. The plaintiff failed by replication to deny these allegations, thereby admitting their truth, and, as a consequence, the defendant's motion for judgment on the pleadings should have been granted.

28. R. 153-156.
29. R.. 156, 158.

3. The court erred in reserving rulings on objections to the admissibility of evidence and in failing to rule upon such objections prior to its decision.
4. The decision of the arbitrator selected by the parties, and to whom their dispute was referred, was binding upon the plaintiff, and the court erred in holding that it was not binding upon him.
5. The court erred in holding that the measure of plaintiff's damage was compensation at the contract rate for the entire unexpired term of the contract, and in not limiting plaintiff's recovery to the compensation which he would have earned under the contract up to the time of the trial.
6. The court erred in failing to deduct from the amount of the judgment the item of $507 (Mex.) admittedly due from the plaintiff to the defendant.

Assignment of Errors.

The record contains 29 assignments of error. Some of these assignments present the same general questions of law. It is not the intention of the plaintiff in error to press or urge upon the court all of the assignments of error contained in the record, not that we concede a lack of merit in any of them, but because we believe that those which we will press and urge upon the court are sufficient to require a reversal of the judgment which is the subject of this writ of error. Accordingly, we

shall herein urge those assignments of error only which present the legal propositions above enumerated, and which in our opinion require a reversal of the judgment of the trial court. These latter assignments of error, as they appear in the record, are as follows:

Assignment Number One.

The court erred in denying the defendant's motion for judgment on the pleadings on account of the failure of the plaintiff to deny the affirmative allegations of defendant's answer in respect of the inefficient and unsatisfactory services of the plaintiff under his contract of employment and his discharge by the defendant by reason thereof.

This assignment is the subject-matter of assignment of error Number 6, and appears in the Transcript of Record at page 277.

Assignment Number Two.

The court erred in permitting the plaintiff to testify in respect of the character and efficiency of his services while in the employ of defendant, in view of the fact that no such issue remained in the case, the plaintiff having admitted that he was inefficient and that his services were unsatisfactory, by failing in his replication to deny the affirmative allegations to that effect contained in defendant's answer.

This assignment is the subject-matter of assignment of error Number 9 appearing in the Transcript of Record at page 295. The testimony so given by the plaintiff was as follows:

"Q. What was the character of the actual services which you performed for the American Trading Company in Tokyo?

Mr. BRYAN. I object to all evidence attempting to show the character of the defendant's services rendered at Tokyo, that fact having already been determined on the pleadings.

The COURT. Ruling reserved.

Eighth Exception.

To which ruling of the court the defendant then and there excepted.

Q. What is the character of the services you performed in the Tokyo office? What class of work did you do?

A. I was practically manager of the financial department. Attended to the credits and collections and I was manager of the accounting department of the American Trading Company, Tokyo, and was head of that department with a number of men under me who did the bookkeeping and handled the details of the accounts of the company, and took care of the records and everything.

Q. Did your duties as performed involve the exercise of——

Mr. BRYAN. I wish a general exception to be noted to all such evidence.

The COURT. Ruling reserved.

Q. Were your services performed in the Tokyo office, did they involve any discretion?

A. In the capacity of manager a great deal of discretion was vested in me.

Q. During the time you served there in your exercise of that discretion did you at any time have occasion to question some of the accounts of other departments which were submitted to you as chief accountant,

A. Yes, sir, I had some occasions of that nature.

Q. Now you say you did question some accounts which were submitted to you for your approval?

A. Yes, sir.

Q. What was your reason?

Mr. Bryan. I object on the ground that this evidence is irrelevant, immaterial and prejudicial to the case of the defendant, and further that this fact has already been determined upon the pleadings.

The Court. Objection overruled.

Ninth Exception.

To which ruling of the court the defendant then and there took exception.

Q. Why did you object to some of the accounts?

A. Because I deemed myself responsible for the accuracy of the accounts of my department and certain statements were put before me in the capacity of manager of my department for endorsement and I declined to endorse anything that was not right.

Q. (The Court.) Put before you by whom?

A. By Mr. Moss, for example, the building department manager, was one.

Q. Any others besides Mr. Moss?

A. No, Mr. Moss, the manager of the building department was the only man whose statements I questioned and whose handling of his department I didn't want to endorse, as chief accountant.

Q. Just what do you mean, endorse?

A. He wanted to pass through our department incorrect amounts which he was not entitled to.

Mr. Bryan. I object to all evidence tending to show the character of the plaintiff's services in Tokyo, that fact having already been determined upon the pleadings.

The Court. Ruling reserved. The evidence will not be considered if it appears that you are entitled to judgment on the pleadings.

Tenth Exception.

To which ruling of the court the defendant then and there excepted.

Q. By endorsement, just explain what you mean. Do you mean you had to sign these accounts as correct?

A. I had to O. K. those incorrect statements.

Q. After you had O. K.'d the statements were they sent to the head office in New York?

A. Yes, sir, and I didn't want to be identified with statements that were not absolutely correct and I declined to put my signature to them.

Q. When incidents like that occurred, did you refer them to Mr. Blake?

A. Yes, sir, on more than one occasion the differences which came up between the building department and my department.

Q. At any time while you were employed there did Mr. Blake, either directly or indirectly, criticise you?

A. Not a word of criticism as long as I was there, until April 30th.

Q. And the 30th of April was more than a month after you were dismissed?

A. Yes, after I wrote him a letter.

Q. And during the course of your employment there did you make recommendations which, in your judgment, would tend to improve the system of accounts? A. I certainly did.

Q. Did you submit those to Mr. Blake?

A. Yes, sir, in the form of a letter.

Q. Did Mr. Blake adopt them? A. No, sir.

Q. When you submitted those matters which you regarded would improve the system did Mr. Blake take exception to your submitting them?

A. No, indeed, he expressed his approval of my recommendations but said——

Q. At any time from the time you entered the employ of the Tokyo office of the American Trading Company up to the date you were dismissed——

A. Do you mean March 19th or April——

Q. When you actually got notice that your services were no longer required, had Mr. Blake or any other person in authority in the Tokyo office, informed you that your services were not satisfactory? Between the time you started work at the Tokyo office and the time you received notice that your services were no longer required?

A. Not a word from anybody to that effect.

Q. Did Mr. Blake, or any man in charge of the Tokyo office, of the American Trading Company, inform you that they considered your conduct insubordinate there?

A. No, sir, not a word to that effect.

Q. Did anyone in authority in that office, anyone superior to you, ever criticise you or tell you you were not keeping proper office hours?

A. No. On one or two occasions Mr. Blake saw me in the hall leading to my office and he had already come in, I think it was about a quarter of an hour or twenty minutes to nine, and he said, 'Well, you are late' and I said, 'Yes, but it was on the Company's business'.

Q. Now as a matter of fact during the period you served there did you serve the full extent of the office period?

A. More than that. I didn't go to tiffin during the lunch hour of twelve to two. I was the only person in the office during the lunch period.

Q. About how long is that period?

A. From twelve to two. And during an illness I attended.

Q. You were ill?

A. Yes. Against the doctor's advice, during the flu scare there. He advised me to stay at home and I even attended the office during my illness trying to do my duty by the Company.

Q. When was the first time it was ever brought to your attention that Mr. Blake or anyone else in authority over you, were dissatisfied with your services?

A. The point of dissatisfaction was never mentioned to me by Mr. Blake.

Q. Never mentioned?

A. Never. Not by anybody in the office.

Q. When was the first time that any claim that you had been insubordinate mentioned to you?

A. When I read Mr. Manley's affidavit was the first time.

Q. When you read it in this court?

A. Yes, sir, the first time that I heard something about that.

Q. Now when was the first time that you were informed you were considered a disturber of the discipline of the office?

A. When I read those affidavits. Nobody ever told me that while I was there in Tokyo.

Q. Now when you were dismissed by Mr. Blake were you ever informed that your services would not be required in Shanghai because of inefficiency or——

A. No, sir, neither verbally nor in writing did he ever say so.

Q. What was the reason?

A. The reason was that Mr. Burns had made arrangements with Mr. Manley to continue in the employ of the Company and as I was to replace Mr. Manley there was no need for me to go to Shanghai as I was not needed here.

Q. When was the first time you had any friction with Mr. Blake?

A. The first time was on the 30th of April.

Q. And you were dismissed on the 19th of March?

A. Yes, sir.

Q. And what gave rise to that friction?

A. I brought a Cashier order with me for one thousand yen.

Q. You presented it to Mr. Blake?

A. I presented it to Mr. Blake because the manager of the Tokyo office declined to O. K. it without Mr. Blake's endorsement.

A. I had received a letter from Mr. Ward, or a cablegram from Mr. Ward to the effect that I was to await advice in Tokyo and that was the understanding, you see.

Q. At the time you presented this order?

A. I wanted to await advices from Mr. Ward in Shanghai instead of Tokyo as they didn't want me there.

Q. You mean by that that you presented this order for funds to proceed to Shanghai?

A. Yes, and to wait there. I wanted about a month's salary. I figured about a thousand yen, and await advice from Mr. Ward in regard to the balance of my contract.

Q. And that is the first time, you say, any friction occurred? A. Yes, and he got annoyed.

Mr. Bryan. I renew my previous exception.

Noted."

Assignment Number Three.

The court erred in holding in its written decision that the letter of August 27, 1918 (Plaintiff's Exhibit C), was not a mere supplement to the original contract of the plaintiff executed in San Francisco on May 27, 1918 (Plaintiff's Exhibit A).

This assignment is the subject-matter of assignment of error Number 14, appearing in the Transcript of Record at page 307.

Assignment Number Four.

The court erred in holding in its written decision that the clause in the original contract dated May 27, 1918 (Plaintiff's Exhibit A), and reading as follows:

> "Satisfactory Service. The undertakings herein contained on our part are all conditioned upon your doing your work in an efficient and satisfactory way",

was not a part of the subsequent contract of August 27, 1918 (Plaintiff's Exhibit C).

This assignment is the subject-matter of assignment of error Number 15, appearing in the Transcript of Record at page 308.

Assignment Number Five.

The court erred in holding in its written decision that plaintiff's original contract of May 27, 1918 (Plaintiff's Exhibit A), was abrogated by the subsequent contract of August 27, 1918 (Plaintiff's Exhibit C), and rendered void and of no effect.

This assignment is the subject-matter of assignment of error Number 16, appearing in the Transcript of Record at page 308.

Assignment Number Six.

The court erred in holding in its written decision that it could inquire into the reasonableness of defendant's dissatisfaction with plaintiff's services and of defendant's consequent right to discharge the plaintiff on account of "unsatisfactory service".

This assignment is the subject-matter of assignment of error Number 17, appearing in the Transcript of Record at page 308.

Assignment Number Seven.

The court erred in holding in its written decision that

> "it could inquire and decide whether or not the discharge (of plaintiff by defendant) was really because of the way plaintiff did his work or on some other ground".

This assignment is the subject-matter of assignment of error Number 18, appearing in the Transcript of Record at page 308.

Assignment Number Eight.

The court erred in holding in its written decision that the burden of proving whether or not defendant

acted in good faith in discharging the plaintiff was upon the defendant rather than upon the plaintiff.

This assignment is the subject-matter of assignment of error Number 19, appearing in the Transcript of Record at page 308.

Assignment Number Nine.

The court erred in holding that the reasons expressed in the letter of May 10, 1919 (Plaintiff's Exhibit 2), and the testimony of William A. Burns were not conclusive and binding upon it in respect of the inefficient and unsatisfactory services rendered by the plaintiff to the defendant under the contract of employment such as justified the defendant in discharging the plaintiff.

The letter and the testimony referred to are the subject-matter of assignment of error Number 20, contained in the Transcript of Record at page 309, et seq., and are as follows:

"May 10th, 1919.

Honorable William Potter,
c/o American Embassy,
Tokyo.

Dear Sir:

We acknowledge your letter of the 2d instant and wish to express our appreciation of your willingness to arbitrate the differences which have arisen between our Company and Mr. A. T. Steele. We further desire to record our appreciation of the good offices of his Excellency Ambassador Morris, which have resulted in your undertaking this task.

In the beginning we wish to explain that it has never been our intention to evade our responsibilities or disregard Mr. Steele's rights under his contract.

The correspondence submitted will show you that Mr. Steele was originally employed on behalf of our Shanghai office, but later on he was held at Tokyo to assume, temporarily, the duties of Mr. Boyd, while the latter took a short holiday.

In the meantime it developed that Mr. Steele's services were not required at Shanghai, and we at once began negotiating with him for the cancellation of his contract. In view of the fact that he had been originally employed by Mr. Ward in San Francisco, who was a personal friend of his, we recommended that the matter should be referred to him for settlement, and we had every reason to believe that this arrangement would be entirely satisfactory.

You will note that we gave Mr. Steele written notice that his services with this office would terminate on Mr. Boyd's return to Tokyo. He took no exception to this arrangement at the time, and in fact as late as April 29th, he told the writer and Mr. Mauger, the agent of the Tokyo office, that he would turn over his duties to Mr. Boyd the following day. This however he failed to do notwithstanding our repeated requests. Owing to his arbitrary and unwarranted actions our business was seriously interfered with for several days.

As an instance of the inconvenience we were subjected to we would say that our accountant's safe remained closed for two days, during which time we were deprived of the use of our securities and other important documents.

During this time we had agreed to Mr. Steele's demand for an arbitration so we contend that there was no ground for his arbitrary and illegal action.

We might point out that Mr. Steele's rights under his contract would have been just as secure without this 'hold up' and we feel sure you will agree with this statement.

We would finally put on record that it was not until the 8th inst. that Mr. Steele handed over the last of our keys which were in his possession.

We now come to the character of Mr. Steele's work while he was in this office. He adopted the attitude from the start that our system of bookkeeping was all wrong, and this of course led to more or less friction and unpleasantness.

During the first few months of his stay here his attendance on the office was so irregular as to cause great hindrance to our business. It very frequently happened that he did not turn up at the office until 9:30 o'clock, sometimes 10 o'clock, or even later—this in spite of the fact that a notice is posted that our office hours are from 9 o'clock.

If required we can offer numerous witnesses to prove the correctness of the above statements.

On three occasions the writer called Mr. Steele to task for his disregard of our office rules, and during one of these interviews we told him that if he found it impossible to comply with our regulations he had better return to San Francisco. Notwithstanding our repeated admonitions he still persisted in ignoring the office rules, and we submit that on this point alone we could have found sufficient justification for cancelling his contract.

We now wish to discuss Mr. Steele's unauthorized correspondence on affairs pertaining to our office.

We enclose copies of his letters of April 17th and April 24th addressed to Mr. L. A. Ward of San Francisco.

These copies are certified to us by Miss Paul who was our stenographer at the time they were written, but who has since left our employ. She is, however, still in Yokohama and would be willing to answer any questions if called upon to do so.

Mr. Steele told the writer that he had addressed certain letters to Mr. Ward, but never mentioned their character; he also intimated that he had taken an extra copy of our files, but at the same time never offered to hand them over.

We now have every reason to believe that his apparent willingness that we should see this correspondence was pure camouflage as it must be appar-

ent to anyone that had we seen the letter of April 24th, it would never have left our office.

Since the beginning of this month we have repeatedly asked Mr. Steele, both verbally and in writing (see copy of our letter of May 6th) for copies of his correspondence with Mr. Ward, but up to this writing he has failed to comply.

We might explain that the addressee of these letters is the Vice President and General Manager of the American Trading Company (Pacific Coast), a Company with which we are associated, but which is a separate and distinct organization.

Mr. Ward has no jurisdiction over this office and is not even an employee of the American Trading Company proper.

We do not even intimate that Mr. Ward was a party to this clandestine correspondence and we even believe that he will disavow any connection with it.

We do not know how many more letters were written or the nature of their contents, but the opening paragraph of the letter of April 17th furnishes proof that there were others. This paragraph also shows that Mr. Steele was keeping Mr. Ward advised of 'developments'.

We would also like to call your attention to the first paragraph of the letter of April 24th in support of our statement that we thought Mr. Steele was agreeable to handing over his duties to Mr. Boyd on the latter's return.

We do not undertake to deal in detail with the balance of the subject-matter of this letter, but we might remark that against Mr. Steele's eight months' service in the Company the men whom he subjects to such severe criticisms and innuendoes have the following records:

Mr. Blake, 23 years; Mr. Mauer, 20 years; Mr. Boyd, 17 years, and Mr. Moss, 9 years.

We would further mention that Mr. Mauger previous to coming to Tokyo, was the chief accountant of our company in New York for a number of years, and is presumably, as capable a man on books

as Mr. Steele, and also has the welfare of the Company quite as much at heart.

We submit that Mr. Steele in carrying on such correspondence was practicing both deception and treachery, and on either count he had committed an unpardonable offense.

If he acted with a realization of what he was doing then certainly he has no excuse to offer, but on the other hand if he pleads ignorance, he convicts himself of being deficient in the most elementary principles of business.

It seems incredible that any man endowed with ordinary intelligence could *do* abuse the confidence of his employers as Mr. Steele has done in carrying on this correspondence.

We would respectfully submit for your consideration the following points:

1. Would Mr. Steele have been justified in writing such a letter as that of April 24th, even to the head office of the Company, without the knowledge and consent of his superior officer?

2. Assuming for argument's sake that your answer to the above is in the affirmative, would he have been justified in sending the same letter to a man who had no connection whatever with the office which employed him?

3. Having committed this offense, has he not proven himself irresponsible and untrustworthy?

4. In view of all the other facts would we not have had good and sufficient grounds for dismissing him from our office?

In conclusion we have to say that under ordinary circumstances we would have had no other thought than to treat Mr. Steele liberally, but in view of the unsatisfactory character of his work and the treachery he has displayed toward his office and employers, we now prefer that the case be settled entirely on its merits.

Respectfully submitting the above, and with renewed thanks for your kind assistance, we remain,

Yours very truly,"

"Q. Now you stated that you objected to Mr. Steele's coming out here.

A. I objected, to Mr. Ward, after meeting him.

Q. For what reason?

A. On account of his personality.

Q. Now when you first saw Mr. Steele did you approve of him? A. No.

Q. Why didn't you approve of him?

A. As I stated to Mr. Ward after my conversation with Mr. Steele that I thought a mistake had been made, as Mr. Ward told me that Mr. Steele was born of Indian and American parentage in India, and that whatever our feelings might be in the matter, that there was strong prejudice against Eurasians in China, and that as chief accountant in our office he would find it very difficult to deal with these objections in China.

Q. You were merely considering the unfortunate position that people like him were placed in Shanghai? A. Yes.

Q. You had no prejudice against him personally?

A. None whatsoever at that time.

Q. It is a fact, isn't it, that in Shanghai people in a position like that Mr. Steele was to occupy, would have to consult with managers of the banks and with other managers of other companies?

A. Yes, especially the managers of banks.

Q. And where a man has to do a thing of that sort he has to be a man that has some social standing in that community?

Q. Did you have any conversation with Mr. Blake relative to the manner in which Mr. Steele rendered his services in Tokyo? A. Yes.

Q. State to the Court in substance what those conversations were.

Mr. Fessenden. I object on the ground that the evidence is hearsay.

The Court. This evidence is admissible under the order of January 14th, 1920. Objection overruled.

Q. Will you state the substance of your conversation with Mr. Blake regarding the services rendered by Mr. Steele at the Tokyo office?

A. When I arrived at Yokohama on my way back to Shanghai after a furlough, Mr. Blake spoke to me about Mr. Steele and said that his services had been most unsatisfactory. That he had been very dilatory, came to the office at 9:30, 10:00, etc., and when Mr. Blake spoke to him, told him, if he didn't mend his ways he had better go back to San Francisco. Said he was a great disturber in the office, that he objected to methods laid down by his superiors, that he had taken on writing for the newspapers and had written articles which, if traced back to an employee of the American Trading Company might injure its business, and that all in all he would be a most unsatisfactory man for me to accept for Shanghai, and *I told him that under these circumstances that I wish that he would make an arrangement with Mr. Steele to cancel any arrangements that might have been made to come to Shanghai, and that if there was any expense attached thereto that while I didn't consider it my business, the Shanghai office would most willingly stand it rather than have Mr. Steele come on to the Shanghai office.*

Q. And the reasons you have stated for not wanting Mr. Steele were brought about on account of what Mr. Blake told you? A. Yes.

Q. And did you receive any correspondence or any letters from Mr. Blake regarding the unsatisfactoriness or inefficiency rendered by Mr. Steele?

A. I did eventually receive a letter from Mr. Blake enclosing all correspondence with Mr. Steele and the arbitrator's ward and the decision of the arbitrator regarding this matter.

(Defendant's Exhibit 1 accepted in evidence.)

(Handing witness Defendant's Exhibit 2.) Accepted as evidence.

Q. What is this letter?

A. An enclosure received from Mr. Blake in a letter which has been submitted to the Court, being Mr. Blake's brief to Mr. Potter in the arbitration arranged between Mr. Steele and the American Trading Company of Tokyo.

Q. Did you write to Mr. Blake and ask him for the documents and papers in the Steele matter?

A. I did.

Q. And as a result of that letter you received a letter dated June 10th, 1919. A. Yes.

Q. And in that letter this was enclosed?

A. Yes. He stated in that letter that he was handing me all of these papers covering the entire case and awaiting the decision of the arbitrator, which he sent with it.

Q. What is this, Mr. Burns?

A. A letter from Mr. Steele to Mr. Blake, dated March 19, Tokyo.

(Handing witness Defendant's Exhibit No. 4.)

Q. What is that, Mr. Burns?

A. The decision of Mr. Potter, the arbitrator, in the case of Steele v. Blake.

Q. Was that enclosed in the letter of June 10th?

A. Yes, it is specifically mentioned in that letter.

Q. Did you write to Mr. Blake asking for the papers in the Steele matter? A. Yes.

Q. And as a result of that letter you received a letter of June 10th, enclosing—including enclosures, one of which is this? A. Yes.

Q. (Handing witness Defendant's Exhibit No. 5.) What is this, Mr. Burns?

A. A letter written by Steele to Ward.

Q. Was that included in the letter of June 10th?

A. Yes.

Q. The letter of June 10th was an answer to a letter that you wrote requesting Mr. Blake to send you all the papers in the Steele matter? A. Yes.

Q. And this was enclosed in that letter? A. Yes.

(Handing witness Defendant's Exhibit No. 6.)

Q. What is this, Mr. Burns?

A. Another letter written by Steele to Ward, dated April 17.

Q. Was that enclosed in the letter of June 10th?

A. Yes.

Q. And the letter of June 10th was in answer to a request for all papers in the Steele matter?

A. Yes.

Q. And this was enclosed in the letter of June 10th? A. Yes.

(Handing witness Defendant's Exhibit No. 7.)

Q. What is this, Mr. Burns?

A. A letter from Mr. Steele dated March 19th.

Q. (Handing witness Defendant's Exhibit No. 8.) What is this, Mr. Burns?

A. A letter from Mr. Blake to Mr. Steele dated May 6th.

Q. Was this enclosed in the letter of June 10th?

A. It was.

Q. (Handing witness Defendant's Exhibit No. 9.) What is this, Mr. Burns?

A. A letter from Mr. Blake to Mr. Steele, dated March 19th.

Q. Was that enclosed in the letter of June 10th?

A. Yes.

Q. (Handing witness Defendant's Exhibit No. 10.) Now, what is this, Mr. Burns?

A. Letter of Mr. Blake addressed to Mr. Ward, San Francisco, dated March 19th.

Q. This was enclosed in the letter of June 10th?

A. Yes.

Defendant's Exhibits 1 to 10, inclusive, offered in evidence.

Mr. Fessenden. I object to the admission of Defendant's Exhibits Nos. 2, 5, 6, 8, 3 and 10 on the ground that they are inadmissible under the order of January 14th, 1920.

The Court. Ruling reserved.

Seventh Exception.

To which ruling of the Court the defendant then and there excepted.

Q. Mr. Burns, where are,—as far as you know, where are the original letters of which the one is enclosed in the letter of June 10th, are copied?

A. In the case of the papers relating to the arbitration, they are in the hands of Mr. Potter, the arbitrator, who has left Tokyo and has gone to

Philadelphia, and Mr. Blake, who has gone to London to take charge of our London office.

Q. Have you endeavored to get a certified copy of these?

A. Yes, we tried to get it from the Minister at Tokyo and he said it should be obtained from Mr. Potter and we have cabled to America to try to get copies of all the papers in the arbitration.

Q. You have used every effort to try to get the original papers or certified copies? A. Yes.

Q. And up to the present you have not been able to get them?

A. They have not come as yet, I telegraphed Mr. Blake at San Francisco, and at New York. The Tokyo office have. It is out of my jurisdiction completely.

Q. Mr. Blake is the only one who had any direct knowledge of this matter? The only one in authority?

A. The matter was entirely in his hands as general manager of the Company for the Far East.

Q. Has Mr. Steele ever come to the office in Shanghai and offered to enter into employment of the—— A. Never."

Assignment Number Ten.

The court erred in holding in its written decision that the defendant was not justified under the terms of plaintiff's contract in discharging the plaintiff because his personality was displeasing to the defendant.

This assignment is the subject-matter of assignment of error No. 21, contained in the Transcript of Record at page 321.

Assignment Number Eleven.

The court erred in holding in its written decision that the contract sued upon by the plaintiff was wrongfully terminated by the defendant.

This assignment is the subject-matter of assignment of error No. 22, contained in the Transcript of Record at page 321.

Assignment Number Twelve.

The court erred in receiving evidence of the plaintiff in respect of the efficiency of his services and the satisfaction of the defendant therewith over the objections of the defendant, and in reserving a ruling upon said objections, and thereafter in failing to rule upon said objections prior to its decision.

This assignment is included within assignment of error No. 9, appearing in the Transcript of Record at page 295, and the subject-matter thereof was hereinbefore set forth under assignment Number Two.

Assignment Number Thirteen.

The court erred in holding in its written decision that the award of the arbitrator selected by the parties and to whom their dispute was referred, not only was not binding upon the plaintiff, but was void and contrary to law.

This assignment is the subject-matter of assignment of error No. 23, appearing in the Transcript of Record at page 321. The award referred to is as follows:

> "Arbitration of case A. Tilton Steele v. D. H. Blake, Vice President, American Trading Co., Tokyo, Japan.
>
> Mr. A. Tilton Steele has a contract with the American Trading Co. (Pacific Coast) a company which Mr. D. H. Blake states is an associated but with a separate and distinct organization from his American Trading Co. in Tokyo. The American Trading

Co. (Pacific Coast) signed by Lewis A. Ward, Vice President and Manager makes a three year contract from July 1st, 1918, with Mr. Steele as chief accountant at their Shanghai office including transportation thereto. On his way to Shanghai Mr. Steele was stopped at Yokohama by wireless from Mr. Blake and requested to assume temporarily the duties of a Mr. Boyd of the Tokyo office while the latter was away on a holiday. In the meantime it developed that Mr. Steele's services were not needed at Shanghai and Mr. Blake states in writing that he began to negotiate with Mr. Steele for a cancellation of his contract and recommends to Mr. Steele that the matter should be referred to Mr. Lewis A. Ward, vice-president and manager of the American Trading Co. (Pacific Coast) who had made the contract hereinbefore mentioned. Mr. Blake also writes that he never had any intention to disregard Mr. Steele's rights under this contract. In Mr. Blake's letter dated March 19th, 1919, he writes in part as follows: 'We have received word from Mr. Burns, agent of Shanghai office that as he has made satisfactory arrangements with Mr. Manley (the chief accountant whose position under the contract Mr. Steele was to take) to remain with the Company, he Mr. Burns did not now wish Mr. Steele to come to Shanghai. We also confirm our statement that as soon as Mr. Boyd returns to his position in Tokyo, probably about the end of April 23 have no further use for your services here, we cannot say what your recourse will be under your contract, but as intimated the other day the writer will be glad to render you such assistance as he can in order to effect a mutual satisfactory settlement—but before anything can be done in this connection it will be necessary for you to make some suggestions in premises.'

Mr. Blake's next letter is May 6th, in which he demands the return of a number of keys which he claims belong to the company and notifies Mr. Steele that he has a debit balance of Yen 541.21 which he asks payment of at once to Mr. Blake. Mr.

Blake's letter to Mr. Steele dated August 27th, 1918, employs him temporarily in Tokyo for practically the same salary as his contract, said temporary employment to be for such time as Mr. Boyd is absent on holiday, which Mr. Blake estimates will be about six months. Mr. Blake further adds in this letter this time will of course apply to Mr. Steele's three years' term as mentioned in original contract. Mr. Blake concludes this letter as follows: 'It is understood between us that this temporary arrangement does not prejudice any verbal understanding which you (Mr. Steele) may have had with Mr. Ward or with Mr. Burns prior to your departure from San Francisco.'

Mr. Steele also claims that he had a verbal understanding in San Francisco with Mr. Burns of the Shanghai office, that his passage back to San Francisco including all legitimate travelling expenses were to be paid by the Company and that both Mr. Ward and Mr. Burns stated to him (Mr. Steele) that this was the custom of the company in all cases of covenanted servants and that Mr. Steele would of course be treated in the same way.

After reading over carefully the briefs which have been submitted by both Mr. Blake and Mr. Steele *I am of the opinion that the matter of the three year contract should be referred to Mr. Ward in San Francisco for settlement.*

Second. That Mr. Blake should pay Mr. Steele in full until such time as Mr. Steele can secure first-class passage back to San Francisco less any indebtedness that may be proved that Mr. Steele owes Mr. Blake.

Hoping that this conclusion may be mutually satisfactory, I am, gentlemen,

Yours very sincerely,

(Signed)

P. S. Mr. Steele's passage to San Francisco to be paid by Mr. Blake's Corp.

To Mr. D. H. Blake,
Vice-President American Trading Co.,
Tokyo, Japan."

Assignment Number Fourteen.

The court erred in denying defendant's motion for a commission to take the deposition of D. H. Blake, through the denial of which motion the defendant was prevented from introducing any direct evidence as to the unsatisfactory and inefficient service of the plaintiff.

This assignment is the subject-matter of assignment of error number twenty-eight appearing in the Transcript of Record at page 325.

Assignment Number Fifteen.

The court erred in holding that the plaintiff was entitled to recover as damages the unpaid balance of his contract compensation during the unexpired term of the contract of employment (i. e., $7500) rather than the amount of the contract compensation which had accrued up to the time of trial.

This assignment is the subject-matter of assignment of error No. 24, appearing in the Transcript of Record at page 324.

Assignment Number Sixteen.

The court erred in failing to deduct from the amount of the judgment awarded to the plaintiff the sum of $507.00 admittedly due from the plaintiff to the defendant.

This assignment is the subject-matter of assignment of error No. 25, appearing in the Transcript of Record at page 325.

Argument.

I.

THE DEFENDANT DID NOT BREACH ITS CONTRACT BY DISCHARGING THE PLAINTIFF, BECAUSE IT WAS AUTHORIZED BY THE CONTRACT TO DISMISS HIM WHENEVER HIS SERVICES WERE "UNSATISFACTORY" OR WHENEVER HE CEASED TO DO HIS WORK IN AN "EFFICIENT" AND "SATISFACTORY" WAY, OF WHICH FACTS THE DEFENDANT WAS THE SOLE JUDGE.

The contract of employment which is the basis of plaintiff's action, was executed in San Francisco, California. It contains a clause reading as follows:

> "*Satisfactory Service*: The undertakings herein contained on our part are all conditioned upon your doing your work in an efficient and satisfactory way."[30]

It is the defendant's position that under this contract it had the right to discharge the plaintiff whenever the services of the plaintiff ceased to be "satisfactory" *to the defendant.* Contracts providing that work shall be done or services rendered by one party to the "satisfaction" of the other party are common. So frequently have they come before the courts that it may be said that the rights to which they give rise are no longer doubtful. It will be necessary to do no more than refer to a few cases and decisions to establish the proposition that where a person contracts to render personal services to the "satisfaction" of his employer, he may be discharged whenever the employer becomes dissatisfied with his services. The employee may feel

30. R. 30.

and prove that he has not been fairly treated by the employer; he may feel and prove that the employer acted *unreasonably* in feeling or expressing dissatisfaction with his services; he may feel and prove that his employer was not *justified* in his dissatisfaction. But on none of these grounds can the employee deprive his employer of the right vouchsafed by the contract to terminate the employment *whenever the employer feels dissatisfied.* The rule expressed in all of the authorities is that under a contract requiring an employee to render services to the satisfaction of his employer, the employer has the right to terminate the contract whenever he becomes dissatisfied with the employee, and the reasonableness of his action or the justification for his dissatisfaction cannot be inquired into by court or jury. The employer's dissatisfaction with the employee's services gives the absolute right to terminate the contract of employment and discharge the employee regardless of any justification or lack of justification in the employer, and without regard to the reasonableness or unreasonableness of his action. In other words, *the employer is the sole judge as to whether or not the services of the employee are to his satisfaction.*

Having in mind that the contract sued on was executed in California, it is well at the outset to note the California rule upon the subject.

In *Tiffany v. Pacific Sewer Pipe Co.*, 180 Cal. 700 (1919) the contract was one for personal services. The plaintiff was engaged as an expert glazeman in the manufacture of brick, for a three-year term. The con-

tract, which was in writing, contained a provision for the termination of the contract if for any reason the employee was unable to turn out glazed brick "satisfactory to the defendant. It will be noted that the "satisfactory" clause referred to the product of the employee's services rather than to his services, a distinction, however, which is without a difference. The employee was discharged, and thereafter commenced suit *and recovered a judgment in the trial court.* Upon appeal, however, the judgment was reversed. In the opinion the court quotes with approval from 13 Corpus Juris at page 675, as follows (p. 702):

> "In contracts involving matters of fancy, taste, or judgment, when one party agrees to perform to the satisfaction of the other, *he renders the other party the sole judge of his satisfaction without regard to the justice or reasonableness of his decision, and a court or jury cannot say that such party should have been satisfied where he asserts that he is not.*"

Applying the rule to the facts of the case before it and holding that the contract constituted the defendant employer the sole judge of whether the quality of brick produced was "satisfactory" or not, the court said (p. 705):

> "All these matters would of necessity be determinable by the taste or judgment of the defendant's managers. And as their experience in the business was an essential element in the exercise of that judgment, it could not have been intended that some other person's judgment should determine the question of satisfactory performance. An express stipulation or necessary implication would be necessary to give such a contract that mean-

> ing. This contract neither declares it directly, nor requires it by implication. The terms of the contract imply that the defendant was not compelled to be satisfied if the quality produced equaled that which was being produced at the time the contract was made. The addition of the phrase 'and satisfactory to the Pacific Sewer Pipe Company' implied a complete satisfaction and authorized the defendant to reject the brick or discharge Tiffany under the terms of the contract if for any reason of any character the quality or quantity of the product was not satisfactory. We think the contract falls within the rule applicable to cases where the judgment of the promiser is involved, and that *his decision that he is not satisfied is conclusive on the other party and upon the court to which the question is presented.*"

Tyler v. Ames, 6 Lansing 280 (1872), involved a contract of hiring whereby the plaintiff was engaged as defendant's agent in the sale of engines manufactured by defendant "for the term of one year *if plaintiff could fill the place satisfactorily*". The plaintiff was discharged by the defendant during the term of the contract, whereupon plaintiff commenced suit for alleged breach of contract. As in the case at bar, *the plaintiff had judgment.* Upon appeal, however, the judgment was reversed. Said the court (p. 280):

> "It was for defendant to determine when plaintiff failed to fill the place of agent satisfactorily, and I know of no one who is authorized to review his decision.
>
> The word 'satisfactorily' refers to the mental condition of the employer, and not the mental condition of a court or jury. The right of determining whether the plaintiff filled the place of agent satisfactorily must, from the nature and

necessity of the case, belong to the person whose interests are directly affected by the plaintiff's action. To require the employer, under such a contract, to prove that plaintiff did not fill the place satisfactorily, would be to require of him an impossibility, unless his own oath was taken as to his mental status on the subject. If he is required to prove facts and circumstances that would justify him in feeling dissatisfied with the manner plaintiff filled his office, it would be annulling this clause of the contract, as, without such a clause, he would have the right to dismiss the plaintiff if he did not properly perform his duties.

The question is quite similar to the one that is sometimes raised on chattel mortgages, containing a clause authorizing the mortgagee to take the property and sell it when he deems himself insecure. The weight of authority is in favor of the right of the mortgagor to take and sell the property without any obligation to prove that the facts and circumstances surrounding the parties justified him in deeming himself insecure."

Kendall v. West, 196 Ill. 221, 63 N. E. 683 (1902), involved a contract for the rendition of theatrical services. The contract was terminated by the employer, whereupon suit was brought. Judgment went for the defendant, and upon appeal was affirmed. Said the court (p. 584):

"The contract of employment provided that appellant should render 'satisfactory services' for which he was to receive the sum of $250 per week. It contained no provision in any manner limiting the appellee in the exercise of his judgment as to what should be deemed 'satisfactory services'. *The appellant did not undertake to render services which should satisfy a court or jury, but undertook to satisfy the taste, fancy, interest, and judgment of appellee.* It was the appellee who was to

> be satisfied and if dissatisfied, he had the right to discharge the appellant at any time for any reason, *of which he was the sole judge.*"

In *Koehler v. Buhl,* 94 Mich. 496, 54 N. W. 157 (1893), it is said (p. 159):

> "It is settled law that, where a person contracts to do work to the satisfaction of his employer, the employer is the judge, and the question of the reasonableness of his judgment is not a question for the jury."

It is obvious, of course, that for a court or jury to hold that the dissatisfaction of an employer was not justified, or that the employer acted unreasonably in expressing dissatisfaction with the services rendered, is to create a new contract for the parties. The employer executes a contract whereby he exacts certain services *satisfactory to him;* the court executes for the employer a contract whereby the employer must be satisfied *if the services are satisfactory to the court.* Of course, employers would not enter into contracts requiring the rendition of services satisfactory to them if they had any reason to believe that the obligation of the employee would be discharged by rendering services which, *in the opinion of a third person,* should have satisfied the employer, although they did not, in fact, satisfy him.

To the effect that the employer is the sole judge of whether the services rendered are "satisfactory" or not, see, further,

Campbell v. Thorp, 36 Fed. 414 (C. C. E. D. Mich. 1888);

Krompier v. Spivek, 170 Ill. App. 621 (1912).

In the latter case the syllabus reads as follows:

> "An employment contract by which an employe agrees to render services 'satisfactory' to his employer may be terminated by the employer if the services rendered are not satisfactory to him and *such employer is the sole judge as to whether the services are satisfactory.*"

See also:

> *Gwynne v. Hitchner,* 66 N. J. L. 97, 48 Atl. 571 (1901).

In the opinion in the case last cited the court refers to *Brown v. Foster,* 113 Mass. 136 (wherein the plaintiff agreed to make for the defendant a "satisfactory" suit of clothes, and the defendant had returned the suit as unsatisfactory) and points out that the Supreme Court of Massachusetts recognized that the judgment of the defendant was conclusive, saying:

> "even if he ought to have been satisfied, the action would not lie; that, when the contract permits the defendant to decide for himself, he cannot be deprived of that contract right."

In *Aquinto v. Fischer,* 165 N. Y. S. 369 (App. Div. 1917), the plaintiff recovered judgment in a suit brought for an alleged wrongful termination of a contract by an orchestra leader against a theater proprietor. The contract contained a clause that the orchestra agreed "to perform their duties faithfully at all times and *to the satisfaction of the manager of*" the defendant. In reversing the judgment for the plaintiff the court said (p. 370):

> "The services contracted for clearly fell within the principle involving the exercise of taste, fancy,

> skill, or professional judgment, and *the satisfaction of the employer was to be determined solely by the employer, and not by the court or the jury.''* (Citing previous New York cases.)

Similar in principle to the foregoing cases is one decided by this court. See

> *Cressey v. International Harvester Co.,* 206 Fed. 29 (C. C. A. 9th, 1913).

In the case cited the contract provided that the employer might terminate it whenever ''it should consider the employee's work unprofitable or undesirable''. In affirming the judgment in favor of the employer this court said (p. 35):

> ''the defendant was authorized to discharge the plaintiff when it should consider his work unprofitable or undesirable. This constituted defendant the judge of when plaintiff's work was profitable or unprofitable to it, or whether it was desirable that it be continued.''

See also the following cases:

> *American Music Stores v. Kussel,* 232 Fed. 306 (C. C. A. 6th, 1916);
>
> *Mackenzie v. Minis,* 132 Ga. 323, 63 S. E. 900 (1909);
>
> *Schmand v. Jandorf,* 175 Mich. 88, 140 N. W. 996 (1913);
>
> *Teichner v. Pope Mfg. Co.,* 125 Mich. 91, 83 N. W. 1031 (1900);
>
> *Frary v. American Rubber Co.,* 52 Minn. 264, 53 N. W. 1156 (1893).

Cases might be multiplied indefinitely to the same effect. The cases cited, however, sufficiently illustrate the rule which as stated at the outset is, that, under a contract for the rendition of "satisfactory" services the employer is the sole judge of whether the services are "satisfactory".

The defendant having terminated the plaintiff's contract upon the ground that plaintiff's services were neither "satisfactory" nor "efficient", the plaintiff was concluded by the defendant's action unless he could both *allege* and *prove* that the defendant acted in bad faith. *The burden of proof in this respect was upon the plaintiff.*

See: *Delano v. Columbia Works & Malleable Iron Co.,* 179 App. Div. 155, 166 N. Y. S. 105 (1917). Affirmed in Memorandum Opinion, 123 N. E. 862.

In the latter case, it is said:

> "In such a case, upon proof of a valid contract and discharge, the burden is undoubtedly on the defendant of coming forward with evidence that the employe was discharged because of dissatisfaction, and it is true that such dissatisfaction must be genuine; but the burden of proof upon the whole case is on the plaintiff and he must show that the claim of dissatisfaction was feigned, not genuine."

The foregoing case was quoted with approval in *Lyon v. Starr Piano Co.,* 107 Misc. 334, 177 N. Y. S. 682 (1919).

See also:

Gilman v. Lamson Co., 234 Fed. 507 (C. C. A. 1st, 1916).

In the case cited, a judgment in favor of the plaintiff in a suit for alleged wrongful discharge was reversed by the Court of Appeals because of the refusal of the District Court to instruct the jury as requested by the defendant that the burden was upon the plaintiff to prove that the termination of his contract was invalid by reason of bad faith upon the part of the defendant.

The syllabus reads as follows:

> "Corporations—Termination of Contract. It was error for the judge to refuse to instruct a jury that the burden is on the plaintiff to prove that the termination was invalid by reason of bad faith on the part of the directors in voting to terminate it."

A. The reasons given by the trial court in holding that the defendant could not terminate the plaintiff's contract of employment are untenable.

The trial court held that the attempted termination of the plaintiff's contract by the defendant was wrongful, and gave three reasons for so holding. These reasons are as follows:

1. The contract of August 27, 1918, was separate and distinct from the original contract of employment made in San Francisco on May 18, 1918, and defendant's dissatisfaction with plaintiff's services under the later contract did not entitle it to terminate the prior contract.[31]
2. The reasons given to the plaintiff for his discharge at the time of the termination of his contract (which did not include any expression

31. R. 144, 145.

of dissatisfaction with plaintiff's services), precluded the defendant from thereafter claiming that plaintiff's services were unsatisfactory.[32]

3. The defendant was not justified in terminating the contract.[33]

We will consider these three reasons in the order in which we have stated them.

(1) The contract of August 27, 1918, was a mere supplement to the original contract of May 18, 1918, and "unsatisfactory" services under the latter contract entitled the defendant to terminate the earlier contract.

It will be recalled that plaintiff's original contract was executed in San Francisco and provided for his employment as chief accountant at the defendant's Shanghai office. The defendant left San Francisco to take up his duties at Shanghai under this contract, and while en route to that place was stopped at Yokohama by a telegram from the defendant requesting him to proceed to Tokyo, there to assume the duties of chief accountant at the Tokyo office of the defendant during the vacation of the regular accountant. Upon arriving in Tokyo the plaintiff received a letter from the defendant[34] fixing the duration of his stay in Tokyo, i. e., during the vacation of the regular accountant, estimated at six months, and providing for certain additional monetary allowances to the plaintiff by reason of the increased inconvenience to which he may have been subjected by his change of plans. The letter further pro-

32. R. 150.
33. R. 150.
34. R. 31.

vided that the services to be rendered by the plaintiff in Tokyo should *"of course apply on your three years' term as mentioned in your original contract"*. It is the defendant's position that this contract was a mere supplement or amendment to the original contract. It specifically provides that the services rendered under it should constitute services under the three-year contract. How services rendered under the subsequent contract of August 27th *should constitute services under the original contract of May 18, 1918,* is inconceivable except upon the view that the latter contract within the contemplation of the parties was a mere amendment of the earlier contract. The fact is that the defendant made a contract for three years with the plaintiff as chief accountant and designated Shanghai his place of employment. Subsequently it developed that the plaintiff's services would be needed by the defendant at Tokyo for a part of the three-year period, and the supplemental agreement was executed providing that the plaintiff should work in Tokyo during the time that his services were required there, and should receive certain additional monetary allowance to compensate him for any increased inconvenience due to the change of location. This being so, it is evident that the provision of the original contract in respect of "satisfactory service" was applicable to all services rendered by the plaintiff for the defendant.

The only services rendered by the plaintiff for the defendant were rendered in Tokyo. Such services were subject to all of the provisions of the original contract executed in San Francisco on May 27 (except insofar as

that contract was expressly modified by the later contract of August 27), because the express provision of the later contract made it so.

A new contract with reference to the subject-matter of a former one does not supersede the former or destroy its obligations, except insofar as the new one is inconsistent therewith. This rule of course is elementary. See, however, as illustrating it, the following cases:

Orpheus Vaud. Co. v. Clayton Inv. Co., 41 Utah 605, 128 Pac. 575 (1912);

Boody v. Rutland etc. Co., 3 Blatch. 25, 3 Fed. Cas. 857 (1853);

Hoffman v. Murphy, 44 Colo. 107, 96 Pac. 780 (1908);

Myers v. Carnahan, 61 W. Va. 414, 57 S. E. 134, 136 (1907).

It is clear, therefore, that if the services of the plaintiff in Tokyo were "unsatisfactory" to the defendant the latter was justified in terminating the original contract of May 27th, 1918.

The trial court argued that the dissatisfaction of the defendant with plaintiff's services *at Tokyo* could be no justification for terminating a contract providing for services *at Shanghai;* it held that the plaintiff never had an opportunity of rendering any services *at Shanghai,* and, therefore, that it was impossible for the defendant to determine whether or not the plaintiff's services were "unsatisfactory", because he had not been given any opportunity to render services *at the place where the contract provided that they should be rendered.* The

answer of course to this argument is twofold: First, the letter of August 27, 1918, was not a separate, independent contract, but was rather only an amendment of the original contract of May 27th, and did not abrogate or nullify or affect any of the provisions of the earlier contract except in respect of a temporary place of employment of the plaintiff and of the compensation which he was to receive during such temporary period. Particularly the later contract did not affect the provision of the earlier contract requiring the plaintiff's services to be "satisfactory" to the defendant; and second, there is no reason why the defendant should be compelled to permit the plaintiff to render services *in Shanghai* when its experience *in Tokyo* with the plaintiff convinced it that he would be neither "efficient" nor "satisfactory" *in Shanghai.* The quality of the services rendered by the plaintiff *in Shanghai* would be no different from those rendered *in Tokyo.* If the plaintiff were an "unsatisfactory" accountant *in Tokyo* he would necessarily be an "unsatisfactory" accountant *in Shanghai.* The argument that the plaintiff was not given an opportunity to demonstrate his fitness and capabilities *in Shanghai* (although he failed *in Tokyo)* savors too much of subtlety and refinement to be the foundation of a judgment of $7500 against the defendant.

(2) The fact that the reasons for plaintiff's discharge given by the defendant to the plaintiff on March 19, 1919, did not include any expression of dissatisfaction with the plaintiff's services did not estop the defendant from thereafter claiming that the real reason for plantiff's discharge was "unsatisfactory" services, or preclude the defendant from showing the real reasons which prompted it to terminate the plaintiff's contract of employment.

It will be recalled that the plaintiff's contract of employment was terminated by the defendant on March 19, 1919, (or rather, evidenced by a letter of that date) while plaintiff was still employed in the defendant's Tokyo office. On that day the plaintiff received a letter from the defendant which confirmed *the verbal expression to like effect of a "few days before"* that "Mr. Burns, Agent of our Shanghai Office * * * had made satisfactory arrangements with Mr. Manley to remain with the Company", and for that reason did not wish the plaintiff to "come to Shanghai".[35]

On the same day the defendant addressed a letter to Mr. L. A. Ward of San Francisco, who was a friend of the plaintiff, and through whom plaintiff's contract of May 27, 1918, had been negotiated. With the letter to Mr. Ward was enclosed a copy of the letter addressed by the defendant to the plaintiff, and among other things the letter to Mr. Ward contained the following:

> "You will perhaps not be prepared for the news that Mr. Steele is not going to Shanghai to our office at that port. I presume that when Mr. Burns went through San Francisco this matter was not discussed with you, because Mr. Burns thought at that time that Mr. Steele would replace Mr. Manley

35. R. 135.

> after the return of Mr. Boyd to Tokyo from his short holiday. In the meantime Mr. Burns has made satisfactory arrangements with Mr. Manley and desires to continue his services with the Company—and that being the case, he has no position for Mr. Steele.''[36]

The trial court took the position that these two letters of the defendant on March 19, 1919, in which nothing was said ''about unsatisfactory or inefficient services'' precluded the defendant from thereafter claiming that the real reason for plaintiff's discharge was his *inefficient* and *unsatisfactory* services.[37] The court's position seems to have been that because ''the only cause assigned for plaintiff's dismissal (in the two letters) ''was that the Shanghai office had persuaded another to remain in his place'', the defendant was estopped to urge another or different reason. The court argued that the defendant was bound by its ''position at the time of the dismissal'',[38] and that, not having taken the position with the plaintiff and informed him at that time that he was discharged because of inefficient and unsatisfactory services, the defendant could not thereafter claim that he was discharged for any such reason. In so holding we submit that the court committed grievous error, both of law and of fact. We shall shortly show by an abundance of authority, that the defendant was entitled to dismiss the plaintiff without giving him any reason at all, provided it was in fact dissatisfied with his services. We shall further show that the reasons given by the

36. R. 136.
37. R. 150.
38. R. 150.

defendant at the time of his discharge were, as matter of law, inconsequential, provided that the defendant was, in fact, dissatisfied with plaintiff's services, and that, notwithstanding any reason given to plaintiff at the time of his dismissal, the defendant could thereafter, at any time, show that the dismissal was occasioned by plaintiff's "unsatisfactory" service. We shall deal first, however, with the error of fact into which the court fell. This requires a brief analysis only of the letter of March 19, 1919, from the defendant to the plaintiff. This letter opens as follows:

> *"With reference to our conversation of a few days ago, we beg to confirm what we told you at that time, to the effect* etc."[39]

It will be noted, therefore, that the letter did not afford the plaintiff the first news of the termination of his contract. This had been done in a conversation preceding the letter by "a few days". The whole tenor of the letter indicates that the plaintiff was satisfied with the arrangement which terminated the contract. It manifests that the plaintiff was in accord with the defendant's course. The letter of the defendant to Mr. Ward on the same day, *viséd by the plaintiff and approved by him,* as we shall later show, proves conclusively that the plaintiff made no objection to the termination of his contract, but on the contrary, was satisfied that the contract should be terminated. The defendant's letter to Mr. Ward states as follows:[40]

39. R. 135.
40. R. 136.

"I had explained the whole situation to Mr. Steele and I think he fully understands the reason for the action which has been taken. *I am pleased to say that he has accepted the situation very gracefully indeed and is quite willing to come to a friendly understanding with the American Trading Company.*

I have suggested that in view of the fact that his contract was made with your good self, he return to San Francisco in due course and come to a settlement with you, and he has been very agreeable to this suggestion.

I think I am correct in saying that Mr. Steele is not altogether satisfied with life in the Far East, and that he is not sorry that his stay here is not to be prolonged, even to the extent of the contract which he entered into.

He is, however, desirous of obtaining some kind of a Government appointment in India, and he tells me that you were fully acquainted with his wishes in this respect at the time you entered into negotiations with him on behalf of the American Trading Company. He would like us to render him such assistance as we can to enable him to get such an appointment, and I have told him that we would provide him with such letters of recommendation as we could, but beyond that I cannot see that we can be of any material assistance. However, I hope that you will do anything that you are able to do in his behalf.

I cannot say at this writing just when Mr. Steele will return to San Francisco, but I am expecting that Mr. Boyd will be back here not later than the end of April, and in that case probably Mr. Steele could get away from here sometime during May.

I am giving Mr. Steele a copy of this letter."

That this letter was viséd and okehed by the plaintiff before being sent to Mr. Ward is conclusively

established by the postscript attached thereto, which reads as follows:

> "P. S. Since writing the above, *Mr. Steele has called my attention to the fact* that my remarks with reference to his not being satisfied with life in the Far East are not exactly in accordance with facts. His proposition is that he is not pleased with life in Japan, but that as far as China is concerned he believes that he would have been entirely satisfied to have completed his contract in that Country."

It appears, then, that after the letter to Mr. Ward was written it was read by the plaintiff and the writer's attention was called to the fact that certain statements were not "exactly in accordance with facts"; accordingly the writer in a postcript corrected the letter to conform "exactly" with the facts as stated by the plaintiff. No exception was taken by the plaintiff to the statement in the letter that the whole situation had been explained to the plaintiff and that he fully understood and appreciated the defendant's action in terminating the contract and took no exception to it. The two letters therefore which the plaintiff and the trial court hold up as conclusive proof that the plaintiff's discharge was not occasioned by "inefficient" or "unsatisfactory" service, upon their face explain the reasons why the defendant did not inform the plaintiff that the termination of his contract was due to his "inefficient" or "unsatisfactory" service. The termination of the contract was an amicable arrangement between the parties. The plaintiff understood the entire situation, and in a spirit of amity with the de-

fendant accepted the same. As shown by the defendant's letter to Mr. Ward the plaintiff was seeking the good offices of the defendant to secure for him a Government appointment in India, and the defendant had engaged to do what it could to further the plaintiff's ambitions in that direction. Under these circumstances, is it to be expected that the defendant would inform the plaintiff that his contract was terminated and he was discharged from its service because of "inefficient" or "unsatisfactory" service? The defendant was assuming, and had the right to assume, that the matter of the cancellation of the contract was one of mutual agreement between it and the plaintiff. Such an understanding breathes forth from every line of the two letters of March 19, 1919, and is the only deduction possible from the plaintiff's concurrence in the expressions of the defendant's letter to Mr. Ward. The defendant, therefore, believing, and having the right to believe, that the cancellation of the contract was agreeable to the plaintiff, and that he had no objection to it, was not called upon to assert a right (of discharge) which it would have been necessary to assert only in the event that the plaintiff was resisting a termination of his contract and disputing the right of the defendant to discharge him. We submit, therefore, that for the trial court to hold up the two letters of March 19, 1919, as conclusive proof that the defendant did not terminate the plaintiff's contract because of his inefficient or unsatisfactory services, is to ignore the impulses of human nature. Men do not gratuitously affront those with whom they have no dispute. The de-

fendant was anxious to get rid of the plaintiff. It had a right to say to the plaintiff "your services under your contract have been inefficient and unsatisfactory, and therefore we terminate your contract and discharge you". It did not choose to take this course initially, but, on the contrary, assumed a conciliatory attitude toward the plaintiff. In a spirit of amity it discussed the situation with the plaintiff, and he made no objection to the termination of his contract; on the contrary, expressed a wish to obtain a Government position in India, *which of course would have rendered it impossible for him to continue with his contract,* and solicited the defendant's good offices in securing him such a position. There was no need, therefore, for the defendant to have informed the plaintiff that it discharged him and terminated his contract on account of inefficient and unsatisfactory services; the matter of the cancellation of the contract and of the discharge of the plaintiff had been accomplished (according to the defendant's understanding) without friction, without acrimony, and without dispute. From the aspect of a question of fact alone, therefore, we submit that the holding of the trial court that the two letters of March 19, 1919, established that the plaintiff was discharged for a reason other than unsatisfactory service, is without support in the evidence.

In its decision the trial court, speaking of the defendant's letter of March 19, 1919, to Mr. Ward, and of the fact that no mention was made therein about "unsatisfactory or inefficient service", says:

> "He [defendant's manager] was writing to another company official, *and could speak without reserve,* yet the only acts assigned for plaintiff's dismissal was that the Shanghai office had persuaded another to remain in his place."[41]

This comment of the court was not justified because it overlooks or ignores the fact shown on the face of the letter, that a copy of the same was to be given to the plaintiff. Necessarily the "reserve" of which the court speaks would be lacking if it were the design of the writer to apprise the plaintiff of the contents of the letter.

Having discussed the question from the aspect of a question of fact, we will deal with it briefly as a question of law, and will demonstrate the following propositions:

1. It is immaterial whether or not all or any of the grounds upon which an employer rests his discharge of a servant were known to him when he discharged the servant.
2. It is not necessary for a master to assign any reason for the discharge of the servant at the time he discharges him.
3. The reasons given at the time of a discharge do not estop the master or preclude him from later asserting some other or different reason, whether known to him at the time of the discharge or not.

The principle resulting from the propositions just stated is that the dismissal of a servant is justified if

41. R. 148.

it appears that a sufficient cause therefor did exist, even if not expressed to the servant at the time of his dismissal.

In *Farmer v. First Trust Co.,* 246 Fed. 671 (C. C. A. 7th, 1917), the syllabus reads as follows:

> "Even if the cause assigned for dismissal of an employee was not in itself sufficient, the dismissal is justified if it appears that sufficient cause therefor did in fact exist."

In support of the proposition just stated many cases are cited in the body of the opinion.

In *Independent Life Ins. Co. v. Williamson,* 152 Ky. 818, 154 S. W. 409 (1913), the syllabus reads as follows:

> "An employer was not precluded from showing that he discharged an employe because he did not perform his duties as agreed, or because his habits were objectionable, because in the letter requesting his resignation the employer stated that he had decided to reduce the force, so that employe's services were not longer required."

In the opinion it is said (p. 411):

> "It is true that in the letter of dismissal O'Kain said he discharged appellee because the company had decided to reduce its force, and did not assign as a reason for the discharge the fact that appellee was not fulfilling his contract. *But the company was not precluded by the reason assigned in this letter from showing that appellee was discharged because he failed to perform his duties in the manner stipulated in the contract, or because his habits and conduct were objectionable.*"

In *Macauley v. Press Publ. Co.,* 170 App. Div. 640, 155 N. Y. S. 1044 (1915), the syllabus reads as follows:

> "Where an employe's disregard of orders as to his hours of work justified his discharge, it was immaterial that he was discharged on account of a matter unconnected with such disobedience of orders."

See also:

Thomas v. Beaver Dam Mfg. Co., 157 Wis. 427, 147 N. W. 364 (1914).

In this case the court *reversed a judgment for plaintiff* in an action for damages for wrongful discharge of an employee. It appeared that the employer *when it discharged the employe gave as its reason that it had concluded to change its mode of selling.* The trial court took the position that the reason so assigned was conclusive upon the defendant and that it could not thereafter show that its real reason for discharging the plaintiff was other than that stated. The Supreme Court of Wisconsin, dealing with this point, said (p. 365):

> "If when respondent was discharged there existed an uncondoned justification therefor, regardless of whether it was then known to appellant, or whether the reason assigned for such discharge was sufficient, the trial court erred in holding that appellant was precluded by the first or any notice of discharge from proving an existing ground not therein referred to. Loos v. Geo. Walter Brewing Co., 145 Wis. 1, 6, 129 N. W. 645, 140 Am. St. Rep. 1052; Von Heyne v. Thompkins, 89 Minn. 77, 93 N W. 901, 5 L. R. A. (N. S.) 524; Crescent Horse Shoe Co. v. Eynon, 95 Va. 151, 27 S. E. 935."

Even if the defendant when it terminated plaintiff's contract had been ignorant of the acts of the plaintiff which it set up in this action to justify the termination of his contract, such fact would have been

immaterial. It has been held that ignorance of a sufficient cause at the time of a servant's discharge or even up to the time of the commencement of an action therefor does not preclude the defendant from justifying its act.

See:

Boston Deep Sea Fishing, etc. Co. v. Amsell, 39 Ch. Div. 339, 357 (1888).

See, also,

Loos v. Walter Brewing Co., 145 Wis. 1, 129 N. W. 645 (1911).

In *Corgan v. Lee Coal Co.,* 218 Pa. St. 386, 67 Atl. 655 (1907) the plaintiff appealed from a judgment against him in an action for wrongful discharge. The contract of employment was "for so long a time up to five years that (plaintiff) *satisfactorily* performs his duties as foreman for said (defendant) company". The defendant became dissatisfied with the plaintiff and discharged him. A the time of his discharge the plaintiff had employed an attorney to secure from the defendant certain profits of the defendant to which he claimed to be entitled. The evidence showed that when the plaintiff was discharged the reason for this discharge given by the manager of the defendant was that "he could not have a man in his employ who was lawing him". It was argued by the plaintiff that the reason so given was the only reason upon which the defendant could rely to justify plaintiff's discharge, and that it was insufficient. The Supreme Court of Pennsylvania, dealing with this matter, said:

"It is suggested here that dissatisfaction with the manner in which plaintiff performed his duties as foreman was not alleged as a reason for the discharge; but in Allentown Iron Co. v. McLaughlin, 1 Mona. (Pa.) 726, it was held by this court that while the master might not have the right to discharge his servant for the cause assigned by him, *'if, at the time, the defendant company had a right to discharge him for any cause, such discharge would not be unlawful because a wrong reason had been given for it'*. The same principle is laid down in Wood on Master & Servant, § 121: 'The master is not bound to give any reason for the dismissal at the time, and if he does, *he is not thereby estopped from setting up any other or different cause which really existed when the servant was discharged'*. Other authorities to the same effect are numerous. Thus in Rossiter v. Cooper, 23 Vt. 522, where a contract of employment provided that the employer, if he became dissatisfied, had the right to dismiss the employee, upon giving him one day's notice, it was held that the employer was at liberty, at any time to put an end to the contract, without informing the employee of the ground of his dissatisfaction, and without in fact having any satisfactory reason for it. In Koehler v. Buhl, 94 Mich. 496, 54 N. W. Rep. 157, it was said: 'It is settled law that where a person contracts to do work to the satisfaction of his employer, the employer is the judge and the question of the reasonableness of his judgment is not a question for the jury'. As we coincide with this view of the case, it is unnecessary to examine the grounds, which the court below regarded as sufficient to justify the defendant company in discharging the plaintiff from its employ. The evidence is ample to show that the dissatisfaction was genuine, and there is nothing to show that it was malicious. Whether or not it was well founded we need not inquire."

The foregoing cases show conclusively that the reason for the termination of plaintiff's contract assigned by the defendant in its two letters of March 19, 1919, did not estop the defendant or preclude it from showing the real reason which actuated it in terminating the contract. If the defendant was dissatisfied with the plaintiff's services under the contract it had a right to discharge him, and it is immaterial that for the purpose of soothing the plaintiff's feelings or for any other reason it did not disclose to him on March 19th the real motive that prompted it in terminating the contract. As we have already pointed out, not only was the defendant on March 19th not called upon as *matter of law to* inform the plaintiff of its real reasons for discharging him, but to have done so would have shown a great want of tact and delicacy upon the part of the defendant, in view of the fact that the letters of March 19th demonstrate that the plaintiff accepted the cancellation of his contract without protest, and solicited the efforts of the defendant to procure for him a Government position in India. To inform the plaintiff, under such circumstances, that he was discharged for inefficient and unsatisfactory services, would be to hurt his sensibilities and wound his pride without justification or excuse. The defendant was entitled, *as matter of law* and required as *matter of delicacy and tact,* to refrain from informing the plaintiff on March 19th of the real reason for his discharge. The fact that it did not inform him on that day, however, of its real motive for terminating his contract is of no consequence in the present case. When the plaintiff sued

alleging a wrongful termination of his contract the defendant was entitled to show any fact which on March 19, 1919, or at any other time, entitled it to terminate the contract.

(3) The trial court erred in assuming that it was entitled to inquire into the reasonableness of defendant's action in discharging the plaintiff or the justification of its action in so doing.

The trial court held that the reasons which the defendant urged as grounds of dissatisfaction with the plaintiff did not "justify" the defendant in discharging the plaintiff for "inefficient" or "unsatisfactory" service.[42] In so holding the trial court subverted the entire principle upon which "satisfaction" contracts are based.

As we have already seen, a contract whereby one person engaged to render "satisfactory" services or services "to the satisfaction" of another, renders the employer the sole judge of whether the services are "satisfactory" or "to his satisfaction". If the employer is *dissatisfied* with the services, *it matters not that a court or jury believes that he should have been satisfied.* To inquire into the reasonableness of the employee's dissatisfaction or the justification for it is to deprive him of the right which the contract gave him to decide such matters for himself. The cases from which we have already quoted make this proposition manifest, and it is not our purpose to requote from them. However, a quotation from *Independent Life Ins. Co. v. Williamson,* 152 Ky. 818, 154 S. W. 409 (1913) from which

42. R. 150.

we quoted supra, is opposite in this connection. Said the court (p. 411):

> "Appellee consented that the company should be the judge of whether or not he violated the contract, and agreed to leave it to it to finally determine whether or not the extent of his violation was sufficient to warrant his discharge, and this privilege the company cannot be deprived of or denied the right to exercise in good faith merely because a court or jury might not think the violation of sufficient importance to justify his discharge. Bridgeford & Co. v. Meagher, 144 Ky. 479, 139 S. W. 750; Thomas v. Houston, Stanwood & Gamble, 146 Ky. 156, 142 S. W. 214, 37 L. R. A. (N. S.) 950; Corgan v George F. Lee Coal Co., 218 Pa. 386, 67 Atl. 655, 120 Am. St. Rep. 891, 11 Ann. Cas. 838; Beissel v. Vermillion Farmers' Elevator Co. 102 Minn. 229, 113 N. W. 575, 12 L. R. A. (N. S.) 403; Mackenzie v. Minis, 132 Ga. 323, 63 S. E. 900 23 L. R. A. (N. S.) 1003, 16 Ann. Cas. 723; 9 Cyc. Secs. 618-624."

The cases cited by the court in support of this conclusion sufficiently show how well established is the rule itself.

Were we to assume, however, that the court was entitled to consider whether or not defendant was justified in being dissatisfied with the manner in which the plaintiff did his work, the record affords ample ground for such dissatisfaction.

The evidence upon which the defendant relied to show the inefficient and unsatisfactory character of plaintiff's services is the subject-matter of Assignment of Error Number Nine hereinbefore set forth at page 17. It is not our purpose to repeat this evidence,

all of which should be read to the court if it would appreciate the difficulties which the defendant experienced with the plaintiff. Suffice it to say that such evidence shows that the plaintiff in

> "his attendance on the office was so irregular as to cause great hindrance to our (defendant's) business. It very frequently happened that he did not turn up at the office until 9:30 o'clock, sometimes 10 o'clock, or even later—this in spite of the fact that a notice is posted that our (defendant's) office hours are from 9 o'clock".[43]

"On three occasions" defendant's manager in Tokyo took the plaintiff to task for his disregard of office rules.[44] The plaintiff was in the habit of writing letters concerning the affairs of the defendant to Mr. L. A. Ward, of San Francisco, *who was not an officer of the defendant or at all interested in the defendant.*[45] This, of course, was a gross breach of confidence upon the plaintiff's part. The plaintiff was continually making charges against various officers of the Company, against one in particular that he was receiving commissions to which he was not entitled.[46] The manager of the Tokyo office informed the manager of the Shanghai office that the plaintiff's services "had been most unsatisfactory", that he was very dilatory; that "he was a great disturber in the office; that he objected to methods laid down by his superiors, that he had taken on writing for the newspapers, and had written articles

43. R. 311.
44. R. 311.
45. R. 311, 312.
46. R. 128, 313.

which, if traced back to an employee of the American Trading Company might injure its business, and that all in all he would be a most unsatisfactory man for me to accept for Shanghai''.[47] The articles referred to were articles written by the defendant for newspapers and magazines in Japan, and which, according to the plaintiff's own statement in a letter to Mr. Ward, might ''prove very unpalatable to the oriental man''.[48] The statements so made by the manager of the Tokyo office to the manager of the Shanghai office prompted the latter to refuse to accept the plaintiff at the Shanghai office, and to request the Tokyo manager to arrange for a cancellation of plaintiff's contract.[49]

The foregoing is a very brief outline only of the more important matters which rendered the plaintiff ''unsatisfactory'' to the defendant. The defendant also objected to the ''personality'' of the plaintiff. It is not our purpose to discuss the latter objection at length, but we believe that a brief perusal of the plaintiff's testimony at the trial would be sufficient to indicate that this objection was well taken. Unfortunately for the defendant the testimony of the Tokyo manager of the defendant was not available at the trial. Defendant sought to take his deposition[50] but the court refused to issue a commission therefor, upon condition that the plaintiff consent to waive objection to the testimony of the Shanghai manager in respect of con-

47. R. 316.
48. R. 132.
49. R. 316, 317.
50. R. 20.

versations which he had with the Tokyo manager regarding the unsatisfactory service of the plaintiff and kindred matters.[51] This the plaintiff did, so that the evidence in the record concerning the "unsatisfactory" service of the plaintiff is that of the Shanghai manager of the defendant, who narrated the conversations which he had with the Tokyo manager and the report of the latter in respect of the plaintiff which prompted him to decline to accept the plaintiff at Shanghai. Mr. Blake, who was the Tokyo manager of the defendant during the period of plaintiff's employment in Tokyo, was in London at the time of the trial.[52] This explains why he did not testify at the trial. Had his testimony been available we have no doubt but that the fact that the services of the plaintiff were "unsatisfactory" and "inefficient" within the meaning of the contract would have been more fully shown. In failing to take Mr. Blake's deposition the defendant was guilty of no lack of diligence. Upon the face of the pleadings *it was admitted that the plaintiff's services had been "inefficient" and "unsatisfactory" to the defendant, and that he had been dilatory and insubordinate.* The allegations setting up these facts in the defendant's answer were undenied in the replication filed by the plaintiff. Under these circumstances, the defendant believed, and had every reason to believe, that the plaintiff intended to admit that his services had been "inefficient" and "unsatisfactory" in Tokyo, and merely intended to challenge the legal suf-

51. R. 21.
52. R. 19.

ficiency of these facts as a defense to the action. Upon the trial, however, the plaintiff took issue with the allegations of the defendant's answer, claiming that such allegations were "deemed" to have been denied, in the absence of a reply. Whether or not this position of the plaintiff was justified by the law is the subject-matter of the next succeeding subdivision of this brief. As soon as it was apprised of plaintiff's position the defendant moved for the issuance of a commission to take the deposition, in London, of Mr. Blake, its former Tokyo manager of the defendant, and who was then in charge of its London office. In order that the trial should not be delayed by the taking of the deposition, the court exacted from the plaintiff a consent that letters that had passed between Mr. Blake and Mr. Burns, the Shanghai manager of the defendant, might be introduced in evidence without objection, and that conversations which Mr. Burns had with Mr. Blake relative to the "unsatisfactory service" of the plaintiff might be testified to without objection. This consent being given, the court denied the defendant's application for the issuance of a commisson to take Mr. Blake's testimony. It is for this reason that we have the indirect and hearsay evidence of Mr. Burns in respect of the unsatisfactory and inefficient services of the plaintiff while in Tokyo. In view, however, of the circumstances under which the defendant was denied the opportunity of taking Mr. Blake's deposition and having him testify fully and directly concerning the subject-matter, we submit that every reasonable inference and presumption should be indulged in favor of the defendant

who was thus denied the opportunity of presenting fully and fairly the merits of its defense in respect of the breach by the plaintiff of the essential condition of his contract requiring "satisfactory service".

The trial court took the position that under the contract of May 27th all that was required to be "satisfactory" and "efficient" was the plaintiff's "way" of doing his "work" as chief accountant.[53] Dealing with the objection that plaintiff was tardy in reporting at the office, and dilatory in respect of office hours, the trial court said:

> "Plaintiff's duties as accountant were not like those of a salesman or other employe who must meet the public at certain hours. There is no claim that the time devoted to his work as an accountant was insufficient" (R. 149).

The defendant, however, and not the plaintiff, was to determine the office hours which the plaintiff should keep. The plaintiff could not report at the office at any hour that he chose, upon the ground that he devoted *"sufficient"* time to his work as an accountant. In the interest of order and discipline in defendant's office defendant had the right to fix the office hours of the plaintiff, and it is no answer to a charge that plaintiff failed to keep the office hours so fixed, that he devoted *"sufficient"* time to his work as an accountant.

Again, dealing with the charge that the plaintiff had been guilty of a grave breach of confidence in re-

53. R. 146.

porting the internal affairs of the Company to Mr. Ward at San Francisco, the trial court said:

> "We cannot see that what he did was any part of his 'work' as chief accountant" (R. 149).

In this we believe that the court was greatly in error. The plaintiff could not divulge the confidences of the office to a stranger to his manager and say that his services were not thereby rendered "unsatisfactory" because his breach of confidence had nothing to do with his "work" as chief accountant. Defendant did not employ a mathematical automation; it employed an accountant to work within a certain limited sphere, who, like every other employe of the Company, was bound by the rule of good faith to his employer, and bound to safeguard the secrets and confidences of his employer's business. If he divulged these secrets and confidences he cannot be said to have been "efficient" and satisfactory in respect of the "way" in which he did his "work". All of the actions of the plaintiff in respect of the defendant's business and what he learned concerning the same have an intimate relation to the "way" in which plaintiff did his "work".

Again, the court complained of the fact that the "particulars" of plaintiff's "disregard of office rules" were not given.[54] But it must be borne in mind that the court did not permit the defendant to take the deposition of Mr. Blake, which, if it had been taken, would have fully shown the "particulars". The court compelled the defendant to submit its defense of "un-

54. R. 147.

satisfactory service'' upon statements made by Mr. Blake to Mr. Burns, which were necessarily a summarization and not a detailed statement of plaintiff's deficiencies. We submit that it comes with poor grace from the trial court to criticise a condition which was the result of its own order.

II.

IN ITS ANSWER THE DEFENDANT ALLEGED THAT THE SERVICES RENDERED BY THE PLAINTIFF TO THE DEFENDANT WERE NEITHER SATISFACTORY NOR EFFICIENT, AS REQUIRED BY THE CONTRACT, AND THAT THE PLAINTIFF IN THE PERFORMANCE OF HIS DUTIES UNDER THE CONTRACT WAS INEFFICIENT, NEGLIGENT AND INSUBORDINATE TO HIS SUPERIORS. THE PLAINTIFF FAILED BY REPLICATION TO DENY THESE ALLEGATIONS, THEREBY ADMITTING THEIR TRUTH, AND, AS A CONSEQUENCE, THE DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS SHOULD HAVE BEEN GRANTED.

The complaint in the action was an ordinary one for breach of contract, based upon the ground that the defendant

> ''wrongfully, improperly and without cause of reason on or about March 17th, 1919, dismissed and discharged the plaintiff and thereby''

wilfully broke the contract of May 27, 1918, a copy of which contract, marked ''Exhibit A'', was annexed to the complaint (R. 2).

The amended answer of the defendant contained an affirmative defense, as follows:

> ''10. That the alleged services rendered by the plaintiff herein to the defendant were neither sat-

> isfactory nor efficient, *as required in the contract alleged in plaintiff's petition, a copy of which is attached thereto and marked Exhibit 'A',* and that the said plaintiff in the performance of his alleged duties was inefficient, negligent and insubordinate to his superiors'' (R. 27).

To defendant's amended answer the plaintiff filed a replication.[55] The replication, however, did not deny any of the allegations of the affirmative defense regarding the ''unsatisfactory'' services of the plaintiff, nor did it deal with any of the matters involved in said affirmative defense, wherefore the defendant moved for judgment on the pleadings. The court reserved its ruling upon the motion, and in its written decision denied the same. We submit that in denying the motion the court erred.

The court in its decision took two positions: (1) that the plaintiff was not required as matter of practice to file a replication at all, and (2) that the allegations of unsatisfactory services contained in the defendant's amended answer were too vague and uncertain to call for a reply, even upon the assumption that a replication was required by the rule of practice in force in the United States Court for China.

In respect of both of these positions we submit that the court erred.

The first is concerned with the rule of practice applicable in the United States Court for China, and the second with the construction of the defendant's answer. We purpose first to discuss the question of

55. R. 28.

practice, and shall endeavor to show that under the rule of practice existing in the United States Court for China the plaintiff was required to file a replication denying any affirmative matters alleged in the defendant's answer which he did not intend to admit, otherwise, the affirmative matters so alleged were deemed to have been admitted by the plaintiff.

A. The rules of practice appertaining to the United States Court for China require the filing of a replication by plaintiff in respect of affirmative matters alleged in the answer, which the plaintiff does not intend to admit.

The United States Court for China was created by the act of June 30, 1906 (34 St. at L. 814). Section 5 of the act creating the court, provides as follows:

> "The procedure of the said court shall be in accordance, so far as practicable, with *the existing procedure prescribed for consular courts in China* in accordance with the Revised Statutes of the United States. Provided, however, that the judge of the said United States court for China shall have authority from time to time to modify and supplement said rules of procedure." (34 St. at L. 816.)

The consular regulations of 1864 were put into force by virtue of section 4085 of the Revised Statutes of the United States (see also 12 St. at L. p. 73). One section of the consular regulations so operative in the consular court in China was the following:

> "in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies, *the common law and the law of equity and admiralty shall be extended in like manner over such citizens and*

> *others in those countries;* and if *neither the common law, nor the law of equity or admiralty, nor the statutes of the United States, furnish appropriate and sufficient remedies, the Ministers in those countries,* respectively, shall by decrees and regulations which shall have the force of law, supply such *defects and deficiencies.*''

Under the foregoing it is evident that the practice in the consular court was regulated *by the common law and the statutes of the United States.* In all cases where the consular regulations, *so supplemented by the common law* and the federal statutes were deficient the Minister was empowered by appropriate decrees and regulations to provide a procedure. If a federal statute, or in its absence the common law, provided a mode of procedure such mode controlled. It is in order therefore, to inquire whether the common law or the federal statutes dealt with the matter of pleading to affirmative allegations of an answer.

The rules of common law pleading are too well known to this court to require any citation to show that a replication was necessary in all cases where the plaintiff wished to deny affirmative allegations in the defendant's answer; under the common law rules of pleading, affirmative allegations of an answer stood admitted on the record unless denied by replication. Moreover, the Alaska Code of Civil Procedure is in force in China, and binding in respect of procedure upon the United States Court for China. This Code is included in the act of June 6, 1900, ''making further provision for a civil government for Alaska'' (31 St. at L. 321). Chapter five of the act deals with the pleadings in

civil actions, which, on the part of the plaintiff are designated as "First, the complaint; second, the demurrer; or third, the *reply*" (31 St. at L. 341).

Chapter nine, sections 67 to 70 inclusive, deals with the reply. Section 69 reads as follows:

> "Sec. 69. If the answer contain a statement of new matter, constituting a defense or counterclaim, and the plaintiff fail to reply or demur thereto within the time prescribed by law or rule of the court, the defendant may move the court for such judgment as he is entitled to on the pleadings, and if the case require it he may have a jury called to assess the damages" (31 St. at L. 343).

Historically it is known that the Alaska Code was patterned upon the Oregon code, with which this court dealt in

> *Patterson v. Wade,* 115 Fed. 770 (C. C. A. 9th 1902).

In the case last cited it was held that under the Oregon code providing that "every material allegation of new matter in the answer not specifically controverted by the reply shall, for the purpose of the action, be taken as true", where facts were alleged in an answer which supported a plea of limitation, and such allegations were not specifically denied in the reply, the defendant was entitled to judgment on the pleadings.

That the Alaska code is applicable to the procedure in the United States Court for China is clear from the decision of this court in

> *Biddle v. United States,* 156 Fed. 759 (C. C. A. 9th, 1907).

The case last cited was an appeal by a defendant from a judgment of the United States Court for China, by which he was convicted of the crime of "obtaining money under false pretenses". It was urged by the appellant that no such crime as "obtaining money by false pretenses" existed at common law or was made a crime by the laws of the United States. Dealing with the latter claim of the defendant, this court pointed out that, under the act creating it, the United States Court for China was vested with all jurisdiction *theretofore existing in the consular courts of China,* and that the jurisdiction of the consular courts under section 4086 of the Revised Statutes comprehended jurisdiction of criminal matters, "in conformity with the laws of the United States". The court then pointed out that both the Alaska code and the code for the District of Columbia made obtaining money under false pretenses a crime, and that the respective acts of Congress creating such codes were "laws of the United States" within the meaning of the statute conferring jurisdiction upon the United States Court for China.

In an Appendix to this Brief we print a decision of the United States Court for China rendered June 9, 1917, in the case of *United States v. McRae.* The decision is by the same judge who decided the case at bar, and involved an application for a writ of mandamus to the clerk of the court to compel him to record articles of a proposed corporation. The suit was brought upon the theory that the Corporation Act of Congress of March 2, 1903, designed primarily for Alaska, was applicable to China. The court so held, but denied

the application for the writ upon the ground that the *form of the proposed articles* was not in accordance with the statute. In its decision the court quotes with approval the opinion of this court in *Biddle v. United States,* supra, and holds that the Corporation Act of Congress intended primarily for Alaska was also applicable to China, because it was a "law of the United States" within the meaning of the statute creating the United States Court for China.

So, in like manner, the above-quoted section of the Alaska Code of Civil Procedure requiring a reply, and providing that a defendant is entitled to judgment upon the pleadings if affirmative allegations in his answer are not controverted by plaintiff in a reply, furnishes the rule of procedure in the United States Court for China. Whether, then, we regard the practice in the United States Court for China as being determined by the common law under the consular regulations above mentioned, or by the Alaska code under the principle announced in *Biddle v. United States,* supra, the result is the same. Both under the common law and under the Alaska code affirmative allegations in an answer, if not controverted in a reply, are deemed admitted, and if sufficient to constitute a defense entitle the defendant to judgment upon the pleadings.

Not only did the law compel the plaintiff to reply to the affirmative allegations in the defendant's answer if he wished to controvert such allegations, *but he acted upon the belief that he was required to file a reply.* It should be borne in mind that the plaintiff in the

present case did file a replication to the defendant's answer.[56] Now when the defendant urges that the reply was deficient, the plaintiff and the trial court answer *that no reply at all was required.* The defendant believed and still believes that a reply was required. Until the trial the defendant had no reason to believe that the plaintiff believed otherwise; the plaintiff actually filed a reply, thereby supporting the defendant's construction of the law. The defendant made a seasonable motion for judgment on the pleadings, based upon the proposition that the plaintiff had failed to controvert certain material affirmative allegations in defendant's answer constituting a defense, and which, uncontroverted, entitled the defendant to judgment on the pleadings. The plaintiff did not amend his reply or make any application for leave to amend. The sole question, therefore, for the court to determine was whether or not a reply was called for from the plaintiff. We submit that it was called for, and that, the plaintiff having failed to controvert the allegations of the answer in respect of the "unsatisfactory" and "inefficient" character of his services the defendant was entitled to judgment on the pleadings.

In its decision the trial court speaks of the right which it undoubtedly would have had to relieve the plaintiff from his default in failing to file a proper reply controverting the allegations of the defendant's answer in respect of unsatisfactory service.[57] This fact is of no consequence in the case. The plaintiff did not

56. R. 28.
57. R. 152.

seek to amend; the court did not permit an amendment, and no amendment was filed. In addition, if the plaintiff had amended his replication by denying the allegations of unsatisfactory service in the defendant's answer, the defendant would have been entitled, *as of right,* to the issuance of a commission to take Mr. Blake's deposition in London. In short, the question whether the defendant was entitled to judgment on the pleadings must be determined by the pleadings as they existed and still exist, and not by what they *would have shown* if the plaintiff had amended pursuant to leave which the court *might have granted,* but which *was never asked.* Not only are we not concerned here with any right of the plaintiff to amend his replication, but, as we have heretofore pointed out, every intendment and presumption should be indulged in favor of the defendant in respect of its defense of "unsatisfactory service". The defendant relied upon the failure of the plaintiff to deny the allegations of "unsatisfactory service" in its answer, and was thereby led to believe that the plaintiff did not question the truth of the allegations. For this reason the defendant did not promptly seek to take the deposition of Mr. Blake. As soon as it learned that the plaintiff intended to dispute the truth of the defendant's allegations of unsatisfactory service the defendant sought to take the deposition of Mr. Blake, by whom such allegations could be proved, and was then met by the objection of the plaintiff and the refusal of the trial court, who, in lieu of Mr. Blake's full, direct and positive testimony, compelled the defendant to rely upon the indi-

rect, hearsay, and incomplete testimony of Mr. Burns. Having been denied the opportunity of making a full presentation of its defense of "unsatisfactory service", we submit that the defendant is entitled to have its right to judgment on the pleadings determined in the light of the pleadings as they existed throughout the trial, unaffected by consideration of what might have been its right if the plaintiff had amended his replication.

We are dealing with an actual condition and not with a theoretical one. The defendant based its motion for judgment on the pleadings upon the record as it existed at the time and as it still exists. It is entitled to have such motion judged in the light of the actual facts and not in the light of a state of facts which never existed.

Closely related to the assignment of error dealing with the denial of the defendant's motion for judgment on the pleadings is the assignment dealing with the admission by the court, over the objection of the defendant, of testimony by the plaintiff in respect of the efficient and satisfactory character of his services in Tokyo. The defendant objected to any testimony by the plaintiff in respect of the efficiency of his services in Tokyo or the satisfaction of the defendant therewith, and to all testimony of the plaintiff in attempted denial of the affirmative allegations of defendant's answer pleading "unsatisfactory service". The defendant's objection was based upon the fact that the plaintiff having failed to deny the allegations of "unsatisfactory service", no issue in respect of that subject-

matter was in the case. The court, however, received this evidence *under a reserved ruling,* with which we hereafter deal. The action of the court in receiving the evidence is the subject-matter of Assignment of Error Number Two, hereinbefore set out at page 9.

It is evident, of course, that if the defendant was entitled to judgment on the pleadings on account of the plaintiff's failure to deny the affirmative allegations of unsatisfactory service, the court erred in permitting the plaintiff to testify in contradiction of the allegations of the answer. If the pleadings as they existed presented no issue in respect of the plaintiff's "unsatisfactory service" the defendant was entitled to judgment on the pleadings, and the plaintiff was debarred from offering any evidence on the subject. The court in its decision, speaking of its duty to permit the plaintiff to amend his replication by adding thereto a denial of the allegations of unsatisfactory service in the defendant's answer urges as the reason therefor that

> "the case was tried on the theory that he [plaintiff] did not admit that his services were inefficient or unsatisfactory" (R. 152).

The case certainly was not tried *by the defendant* upon the theory that any issue remained in the case in respect of the unsatisfactory service of the plaintiff. Defendant, both by motion for judgment on the pleadings and by objecting to all evidence offered by the plaintiff in respect of his satisfactory service, indicated as clearly as it could its position that the pleadings had disposed of the issue of "satisfactory service". Plaintiff's theory of the case, or the mo-

tive which actuated him, is immaterial, unless it was prompted by some action of the defendant. This, however, as we have shown, was not the case.

In concluding this branch of the argument, we submit that:

1. The defendant's motion for judgment on the pleadings should have been granted, because the plaintiff admitted on the record that his services were unsatisfactory and inefficient.

2. The court erred in receiving the plaintiff's evidence in respect of the efficiency of his services and the satisfaction of the defendant therewith, in view of the fact that there the pleadings presented no issue in respect of this subject-matter, the same having been removed by the plaintiff's failure to deny the defendant's allegations of unsatisfactory service.

3. Every intendment and presumption should be indulged in favor of the testimony of the defendant in support of its allegations of "unsatisfactory service" of the plaintiff, in view of the fact that the trial court refused to issue a commission for the taking of the deposition of Mr. Blake, the former manager of defendant's Tokyo office. The trial court was not entitled to criticize any deficiency in the defendant's proof on this subject considering that such deficiency, if it existed, was due to the court's denial to the defendant of the opportunity of taking the deposition of Mr. Blake, from whom full and complete proof on the subject would have been forthcoming. The defendant's failure to make early application for a com-

mission to take Mr. Blake's testimony was due entirely to the fact that no issue was presented by the pleadings in respect of the subject of the unsatisfactory service of the plaintiff.

B. The allegations of the defendant's answer in respect of plaintiff's "unsatisfactory service" were such as required a reply if the plaintiff did not wish to admit such allegations.

The trial court in addition to holding that as matter of practice a reply was unnecessary *in any case* in the United States Court for China, held that the allegations of the defendant's answer setting up the "unsatisfactory" and "inefficient" services of the plaintiff were too vague and uncertain to call for a reply. The court invoked the rule that only material allegations which are well pleaded are admitted by failure to deny and not indefinite, indistinct and equivocal allegations (R. 151, 152.) It held that the defendant's allegations in respect of "unsatisfactory service" were indefinite and immaterial, and therefore within the operation of the rule just mentioned.

The court, after quoting the allegations of defendant's answer in respect of plaintiff's "unsatisfactory services", said:

> "But what were the 'alleged services' and 'alleged duties' here mentioned? How were they alleged and by whom? The complaint alleges nothing about plaintiff's 'duties' or 'services'. Neither did the contract (Ex. 'A') require the 'services rendered by the plaintiff'—i. e., in Tokio—to be 'satisfactory or efficient'. The averment is, therefore, indefinite, whereas, to support a judgment, it 'must be distinct and unequivocal'.

> Again the only services in issue here are the actual (not alleged) ones which plaintiff rendered in Tokio and the future (though not alleged) ones which he offered, but was not permitted, to render in Shanghai. None of these can correctly be included in the phrase 'alleged services' and the averment regarding them is thus also immaterial'' (R. 151).

This argument of the court is both strained and illogical. It is based in part upon the premise that the ''satisfactory service'' clause did not apply to plaintiff's services in Tokyo, an argument not at all applicable to the question of *pleading* which the court was considering.

Again, the court dilates on the reference to ''alleged'' services as though there could be any doubt in plaintiff's mind as to just what defendant meant by the allegations of its answer. The defendant charged that the *only services which the plaintiff ever rendered to it,* i. e., the services at Tokyo, were inefficient and unsatisfactory, and that the plaintiff in the performance of them was dilatory and insubordinate. The court and the plaintiff knew just what the defendant meant and it is mere quibbling to say that the plaintiff may have been misled by the reference to ''alleged'' services in view of the fact that his services were ''actual''.

III.

THE COURT ERRED IN RESERVING RULINGS ON OBJECTIONS TO THE ADMISSIBILITY OF EVIDENCE, AND IN FAILING TO RULE UPON SUCH OBJECTIONS PRIOR TO ITS DECISION.

As hereinbefore stated, the plaintiff offered testimony to prove that his services in Tokyo were "efficient" and "satisfactory" to the defendant. The defendant objected to all of this testimony upon the ground that the issue of "unsatisfactory service" had been removed from the pleadings through the plaintiff's failure to deny the affirmative allegations of the defendant's answer setting up "unsatisfactory service" of the plaintiff.[58] The court received all of the evidence of the plaintiff on the subject, however, *under a reserved ruling.*[59] The court did not during the trial or at any time thereafter rule upon the admissibility of the evidence or the objection of the defendant. In its decision the court does not pass upon the admissibility of the evidence thus received by it, or upon the objection of the defendant to such evidence. It is true that the court in its decision refers to the testimony of the plaintiff, but nowhere in its decision does the court make a ruling upon the admissibility of such testimony. The case, therefore, in respect of the defense of "unsatisfactory service" stands as follows: The defendant pleaded affirmatively that plaintiff had been inefficient and unsatisfactory, insubordinate and dilatory. The plaintiff made no denial of these allegations *in his pleadings.* On the trial the plaintiff, *by his testimony,* sought to con-

58. Assignment of Error 12, supra, p 27.
59. See footnote 58.

trovert the allegations. The defendant objected to plaintiff's testimony upon the ground that the matter no longer was at issue. The trial court declined to rule upon the objection, but received the testimony under a reserved ruling, *and at no time during the trial or thereafter in its decision ruled upon such objection.* We submit, therefore, that for this reason, if for no other, the judgment must be reversed.

The only evidence relied upon by the plaintiff to show that the defendant did not discharge him because of "inefficient" or "unsatisfactory" service, but for a reason unrelated to the character of plaintiff's service, was the testimony of the plaintiff himself. This testimony, however, is in the record over an objection of the defendant never passed upon by the trial court. Under these circumstances, such evidence cannot be considered, and the judgment must be reversed.

The Supreme Court of California has had occasion many times to consider the practice of reserving rulings to objections, which, in *Stanwood v. Carson,* 169 Cal. 640, 644 (1915), it characterized as "a practice to be reprobated and deplored".

In *Raymond v. Glover,* 122 Cal. 471 (1898), the syllabus reads as follows:

> "It is error for a court not to pass upon an objection made to the admissibility of evidence, which was taken subject to a subsequent ruling as to such admissibility."

In the case cited a judgment in favor of plaintiff was reversed for failure of the trial court to pass upon

an objection to testimony upon which in a large measure the judgment rested.

See, also,

Mayo v. Mazeaux, 38 Cal. 442 (1869);
City of Stockton v. Dunham, 59 Cal. 609 (1881);
Martin v. Lloyd, 94 Cal. 195 (1892).

The failure of the court to rule upon defendant's objection to plaintiff's testimony, necessitates a reversal of the judgment in the case, regardless of the merits of defendant's other points.

IV.

THE DECISION OF THE ARBITRATOR SELECTED BY THE PARTIES, AND TO WHOM THEIR DISPUTE WAS REFERRED, WAS BINDING UPON THE PLAINTIFF, AND THE TRIAL COURT ERRED IN HOLDING THAT IT WAS NOT BINDING UPON HIM.

As previously stated, as soon as the plaintiff's contract was terminated by defendant, negotiations were entered into between the parties relative to an arbitration of their differences. At the instigation of Honorable Roland Morris, United States Ambassador to China, it was arranged that the claims of the plaintiff against the defendant should be submitted to Mr. William Potter. Accordingly each of the parties submitted to Mr. Potter a statement of his position. The plaintiff, upon his part, submitted a full and complete statement of his employment by the defendant of the services rendered by him and of his claim against the defendant. The plaintiff's statement (Plaintiff's

Exhibit "H") is in three sections. The first comprises a so-called "chronological statement of the facts of the case" between the date of plaintiff's employment in San Francisco and his arrival at Yokohama. The second section deals with the "Tokyo Office Period", and of the relations of the parties during that period. Section 3 of the plaintiff's statement comprises a "Statement of Claims" of the plaintiff against the defendant. Plaintiff's entire statement comprises twenty pages of the record, and is set forth at pages 40 et seq. thereof.

As against the claims of the plaintiff thus submitted to the arbitrator, the defendant submitted a statement of its position and of the reasons justifying its discharge of the plaintiff. Among other things the defendant asserted that the plaintiff "adopted the attitude from the start that our system of bookkeeping was all wrong, and this of course led to more or less friction and unpleasantness". (R. 117). Another instance of plaintiff's "unsatisfactory service" was thus stated (R. 117-118):

> "During the first few months of his stay here his attendance on the office was so irregular as to cause great hindrance to our business. It very frequently happened that he did not turn up at the office until 9:30 o'clock, sometimes 10 o'clock, or even later—this in spite of the fact that a notice is posted that our office hours are from 9 o'clock."

Again, dealing with plaintiff's "unsatisfactory service" as the defendant's letter to the arbitrator states (R. 118):

> "On three occasions the writer called Mr. Steele to task for his disregard of our office rules, and during one of these interviews we told him that if he found it impossible to comply with our regulations he had better return to San Francisco. Notwithstanding our repeated admonitions, he still persisted in ignoring the office rules, and we submit that on this point alone we could have found sufficient justification for cancelling his contract."

The defendant in its letter to the arbitrator also discussed at length the clandestine correspondence of the plaintiff with Mr. L. A. Ward in San Francisco, relative to the affairs of the defendant, and asserted that this alone was sufficient to warrant the discharge of the defendant, because Mr. Ward was not even an employee, much less an officer, of the defendant, but was an officer of a separate and distinct organization.

Dealing with this correspondence, the defendant's position outlined to the arbitrator was as follows (R. 120-1):

> "We submit that Mr. Steele in carrying on such correspondence was practicing both deception and treachery, and on either count he has committed an unpardonable offense.
>
> If he acted with a realization of what he was doing, then certainly he has no excuse to offer, but on the other hand if he pleads ignorance, he convicts himself of being deficient in the most elementary principles of business.
>
> It seems incredible that any man endowed with ordinary intelligence could so abuse the confidence of his employers as Mr. Steele has done in carrying on this correspondence.
>
> We would respectfully submit for your consideration the following points:

1. Would Mr. Steele have been justified in writing such a letter as that of April 24th, even to the head office of the company, without the knowledge and consent of his superior officer?

2. Assuming for argument's sake that your answer to the above is in the affirmative, would he have been justified in sending the same letter to a man who had no connection whatever with the office which employed him?

3. Having committed this offense has he not proven himself irresponsible and untrustworthy?

4. In view of all the other facts would we not have had good and sufficient grounds for dismissing him from our office?''

Enclosed in defendant's letter to the arbitrator was a copy of plaintiff's original contract of May 27, 1918, a copy of the letter of March 19, 1919, confirming the termination of plaintiff's contract, and copies of three letters to Mr. Ward.

The claims of the parties having been fully set forth in the respective statements which they made to the arbitrator, the latter rendered a decision in which he pointed out that the contract of May 27, 1918, was made by the plaintiff ''with the American Trading Co. (*Pacific Coast*), a company * * * with a separate and distinct organization from (the) American Trading Co. in Tokyo''. (R. 124.) The fact that the plaintiff's contract was with a corporation separate and distinct from the defendant, and that the arbitrator fully understood and appreciated that fact, is of the utmost importance in considering the award of the arbitrator. In the present case the defendant by a plea in abatement and by answer asserted that

the contract, upon which the plaintiff sued, was not made with the defendant at all, but with a separate, distinct corporation, and the defendant therefore urged that it was under no liability to the plaintiff whatsoever. The plaintiff's position, adopted by the trial court, was that the American Trading Company (*Pacific Coast*) which actually executed the contract with the plaintiff, was acting in the matter merely *as the agent* of the defendant, who was its undisclosed principal. The judgment in favor of the plaintiff was based entirely upon the proposition that the defendant was an undisclosed principal in respect of the contract of May 27, 1918, made by the plaintiff with a separate and distinct corporation known as American Trading Company (*Pacific Coast*).

Having fully considered the claims of the parties in the light of the facts just stated, the arbitrator made his award as follows:

1. "I am of the opinion that the matter of the three year contract should be referred to Mr. Ward in San Francisco for settlement."
2. "Mr. Blake [Vice President and Manager of the defendant in Tokyo] should pay Mr. Steele in full until such time as Mr. Steele can secure first-class passage back to San Francisco, *less any indebtedness that may be proved that Mr. Steele owes Mr. Blake.* * * * Mr. Steele's passage to San Francisco to be paid by the defendant." (R. 126-127.)

Two objections are made against the binding and conclusive effect of the award thus made by the arbitrator. The plaintiff argued and the trial court held that (a) the arbitrator did not decide the matters re-

ferred to him, but delegated his power in that respect to Mr. Ward in San Francisco, and (b) he left open the amount of the indebtedness of the plaintiff to the defendant.

The plaintiff's position, concurred in by the trial court, was that the award was void for the reasons just stated. We submit, however, that both of these objections to the award are without merit.

It must be admitted that the award is not phrased as satisfactorily or as conclusively as a judicial decision would be. This is a matter of regret. The award of the arbitrator is expressed colloquially in the language of a layman, but, if its meaning can be ascertained, it is entitled to an effect as conclusive as though phrased with metriculous art and judicial conclusiveness. We will deal briefly with the two matters which the arbitrator decided, and will endeavor to demonstrate that the award clearly shows that the objections of the plaintiff and of the trial court are unfounded.

The arbitrator determined "that the matter of the three-year contract should be referred to Mr. Ward in San Francisco for settlement". (R. 126-127.) It is urged that the arbitrator in the language just quoted refused to decide the plaintiff's claims against the defendant, based upon the three-year contract, but attempted to delegate his power of decision in respect to the same to Mr. Ward in San Francisco. We believe that this is a strained construction of the award. The *arbitrator was selected to decide the controversy.* It is highly improbable that any reasonable man selected

to decide a controversy between two others would attempt to delegate his power of decision to a third person. He was authorized by each of the parties to make the decision himself, and we submit that his award must be so construed, if possible, as to spell out of it a decision by the arbitrator rather than a delegation of the power to decide. We believe that so construed there is no difficulty at all in the matter. Bearing in mind that the three-year contract of May 27, 1918, was executed by American Trading Company (*Pacific Coast*), a corporation separate and distinct from the defendant; that this matter was urged by the defendant to the arbitrator (just as it was urged in the present action as a defense thereto); bearing in mind that the defendant was disclaiming *any* liability to the plaintiff *based upon the three-year contract,* for the reason that the defendant was not a party to that contract, the meaning of the arbitrator is clear. By deciding that "the matter of the three-year contract should be referred to Mr. Ward in San Francisco for settlement", all that the arbitrator meant was this:

> "Mr. Steele has a three year contract executed in San Francisco between himself and American Trading Co. (Pacific Coast) through Louis A. Ward, its Vice President and Manager. I find that American Trading Co. (Pacific Coast) is a corporation separate and distinct from the defendant. Under these circumstances the plaintiff is without recourse against the defendant on the contract of May 27, 1918; he must look to the corporation with which he contracted, namely, the American Trading Co. (Pacific Coast), of which Mr. Ward is the Vice President and Manager. I therefore

> find against the plaintiff in respect of his claim based on the three year contract, and decide that the only liability on that contract is the liability of the corporation *which really employed the plaintiff*—i. e., American Trading Co. (Pacific Coast), or Mr. L. A. Ward, its Vice President and Manager, to whom I refer the plaintiff.''

If the arbitrator had expressed his decision in the hypothetical language just quoted there would be no doubt of his meaning or the conclusiveness of his decision. The mere fact that the arbitrator's language is more cryptic or less verbose is no reason why a different interpretation should be placed upon it than would be necessarily placed upon the language of the hypothetical decision. The arbitrator selected to decide the controversy of the parties decided that controversy *as between the parties before him* by holding that the plaintiff had no recourse against the defendant on the main contract, and that his only claim based on that contract was against the particular corporation that had employed him. We submit, therefore, that the first ground of the plaintiff's objection to the award falls.

The second ground of attack upon the award of the arbitrator had to do with the deduction of ''any indebtedness that may be proved that Mr. Steele owes Mr. Blake''. (R. 127.) In respect of this objection two facts will be noted: first, *it did not deal with liability under the three-year contract at all,* so that any objection to which it might give rise would pertain not to liability upon the three-year contract, but solely in respect of liability under the employment of the de-

fendant during what he styled the "Tokyo period". (R. 46.) We believe, however, that not even in respect of the latter period is the language of the arbitrator uncertain or inconclusive.

The arbitrator had before him the written statements of both the plaintiff and the defendant. The sole evidence submitted to the arbitrator was the written evidence incorporated in the record. The evidence so submitted upon the part of the defendant, as stated by the arbitrator, showed that there was a debit balance of Yen 541.21 due from the plaintiff to the defendant. (R. 126, 135.) The plaintiff's written statement of claim to the arbitrator showed a debit balance from the plaintiff to the defendant of Yen 545.21. (R. 59.) It will thus be seen that the only indebtedness from the plaintiff to the defendant spoken of by either of the parties was a debit balance asserted by the defendant to be Yen 541.21 and conceded by the plaintiff to be Yen 545.21. In other words, the plaintiff in his written statement of claim stated that he was indebted to the defendant in a sum exceeding by Yen 4 the sum in which the defendant contended that the plaintiff was indebted. No other indebtedness from the plaintiff to the defendant was claimed by the defendant or admitted by the plaintiff. The only difference between the parties, therefore, in respect of the plaintiff's indebtedness was a matter of Yen 4. In view of the fact that the fraction, i. e., .21, was the same in the statement of each of the parties, the arbitrator evidently believed that either the claim of the defendant was erroneous by Yen 4, or the computation of the plaintiff

was erroneous by the same amount. He evidently believed that a clerical error had been made in respect of the Yen 4, which in the settlement would be discovered, and he directs the defendant, therefore, to pay to the plaintiff a certain amount "less any indebtedness that may be proved that" the plaintiff owes the defendant. This indebtedness, however, was a matter admitted by the parties except to the extent of Yen 4, which upon the face of the evidence submitted to the arbitrator appeared to be the result of a mere clerical error made by one or the other of the parties. Under these circumstances, to hold that the arbitrator did not decide the matters submitted to him because he debited the plaintiff with the amount of an "indebtedness that may be proved" that he owed the defendant, in our opinion, savors of captiousness. It is quite evident from the evidence upon which the arbitrator decided the claims of the parties, that he failed to ascertain the exact amount which the plaintiff owed because of the uncertainty (arising in all probability from clerical misprision) as to whether the amount was Yen 545.21 or Yen 541.21. We submit, therefore, that it cannot in truth or in law be held that the award of the arbitrator is fatally uncertain because of his failure to ascertain and determine the amount which the plaintiff owed to the defendant.

It is the policy of the law to encourage litigants to adjust their differences by arbitration. In the case at bar the parties submitted their differences to an arbitrator. He heard all of the evidence which either party offered. He made an award which denied to the plain-

tiff any relief *against the defendant* in respect of the three-year contract of May 27, 1918. The asserted liability under the latter contract is the subject matter of the present suit. We submit that it is plain from the award of the arbitrator, read in the light of the facts attending the same and the evidence upon which the arbitrator acted, that he meant to assert in his award the principle that the plaintiff could not enforce the three-year contract against the defendant, because the latter had not executed that contract. This being so, we submit that the objections of the plaintiff to the arbitrator's award are untenable, and that the trial court erred in holding that such award was void and not binding upon the plaintiff.

V.

THE COURT ERRED IN HOLDING THAT THE MEASURE OF PLAINTIFF'S DAMAGE WAS COMPENSATION AT THE CONTRACT RATE FOR THE ENTIRE UNEXPIRED TERM OF THE CONTRACT, AND IN NOT LIMITING PLAINTIFF'S RECOVERY TO THE COMPENSATION WHICH HE WOULD HAVE EARNED UNDER THE CONTRACT UP TO THE TIME OF TRIAL.

The contract sued upon in the present case was executed on May 27, 1918, and provided for a three-year term to commence not later than July 1, 1918. The plaintiff was wrongfully discharged, according to the allegations of his complaint, on March 17, 1919. He continued, however, in the employment of the defendant at Tokyo until May 3, 1919. Plaintiff's action was commenced on July 3, 1919, at which time it will be

noted the contract had just two years to run. In awarding judgment to the plaintiff the court concluded that he was entitled to compensation at the contract price *for the entire unexpired term of the contract, and not merely for the period intervening between the date of his discharge and the date of the judgment* (R. 157). The court further held that the damages so awarded could not be mitigated by reason of any employment which the plaintiff might have secured in the interim, *for the reason that no employment offered him was of equal dignity with that contemplated by his contract with defendant, i .e., chief accountant,* and that plaintiff was not required to accept employment of a lower grade, because such fact, by demeaning the plaintiff, might injure his future earning power (R. 159). We shall discuss both of the questions involved in the court's decision, dealing first with the question of the measure of damages, and later with the question of mitigation.

A. The plaintiff's recovery should have been limited to the period of time intervening the date of his discharge and the date of the trial.

The proper measure of damages for the wrongful discharge of an employee has been the subject-matter of much dispute. The cases may be said to be in hopeless conflict upon the subject. The question has never been decided by this court; it has, however, been decided in this circuit.

In *Schroeder v. California Yukon Trading Co.,* 95 Fed. 296 (1898), decided by the *District* Court for the

Northern District of California, it was held that where a contract was wrongfully terminated and suit brought and trial had for the breach prior to the expiration of the contract term, the plaintiff's damages were limited to the contract compensation *up to the time of the trial,* less such sum as the plaintiff actually earned and received during that time, or might with reasonable diligence have earned by accepting employment of the same nature.

In *American China Development Co. v. Boyd,* 148 Fed. 258 (1906), decided in the *Circuit* Court for the Northern District of California, it was held that a plaintiff wrongfully discharged was entitled to prospective damages *covering the unexpired portion of the contract term subsequent to the date of trial.*

It remains then to consider which rule is supported by the greater weight of reason.

The general state of the authorities is well summarized by *Sutherland on Damages,* 3d ed. Vol. 3, sec. 692 (p. 2081). Speaking of an action for damages for wrongful discharge, the author says:

> "* * * there will be a disadvantage in some states in its being brought before the expiration of the term of employment. The full damages for that term cannot be assessed in advance. This was strikingly illustrated in a Wisconsin case. The plaintiff had been employed at an annual salary of $2,000 to act as superintendent of a lumbering establishment for five years. He was discharged at the end of the first year, and then brought suit to recover damages in respect to the remaining four years. He had found other employment for one year at a salary of $1,000, and the trial having

taken place while he was performing this engagement, the trial court proceeded on the presumption, as a legal one, that the state of facts existing at the time of the trial would continue through the ensuing years to the end of the contract term, and a verdict for $4,000 was found in favor of the plaintiff. This was set aside on appeal on the ground that there could be no such presumption. Cole, J., said: 'In any business the price of labor fluctuates greatly within four years; particularly is this true in the lumbering business in this country. Now suppose the respondent could only obtain for his services next year $500, and so on, would it not be unjust to say that he should only recover according to the rule adopted by the jury in this case. Or suppose the value of the labor should rise to that he could obtain for his services $2,000 or $2,500 a year, what then would be his loss for the failure of the appellant to fulfill his contract? Still further difficulty presents itself. Suppose the respondent should die within the four years, or become incapacitated to perform service of any kind, would he be entitled to recover the damages he has recovered? * * * As the case now stands, we think he was only entitled to recover his salary on the contract down to the day of trial, deducting therefrom any wages which he might have received, or might reasonably have earned in the meantime.' ''

The Wisconsin case quoted from is

Gordon v. Brewster, 7 Wis. 355 (1858).

The author then refers to the "strong and well supported dissent from this doctrine", treating the Wisconsin case as representing the prevailing doctrine.

Schroeder v. California Yukon Trading Co., 95 Fed. 296 (1898), supra, was a suit in admiralty to recover damages for the breach of contract of employment as

master of a vessel. Speaking of the amount of damages to which the libelant was entitled, Judge DeHaven said (p. 298):

> "In my opinion, a sum equal to what would have been earned by him under his contract *up to the date of the trial* and the amount expended by him in returning to San Francisco, less what he has been paid by defendant and what he earned and received from other employment after his discharge from the service of defendant and before the trial of this action."

In support of his conclusion the learned Judge cited *Gordon v. Brewster,* supra, the rule of which he declared to be "reasonable and just".

See, also,

Darst v. Mathieson Alkali Works, 81 Fed. 284 (C. C. N. D. Va., 1896).

In this case the syllabus correctly states the conclusion of the court as follows:

> "When suit is brought and trial is had before the expiration of the stipulated term of service to recover damages for a breach of contract by a wrongful discharge, *the recovery cannot be for the whole amount of salary for the entire term, but only for the amount thereof to the date of trial,* less such sum as plaintiff has earned, or might with reasonable diligence have earned, from the time of discharge to the time of trial."

To the same effect as the foregoing cases, see

Sommer v. Conhaim, 25 Misc. 166, 54 N. Y. S. 146 (1898);

McMullen v. Dickenson Co., 60 Minn. 156, 62 N. W. 120 (1895);

Pape v. Lathrop, 18 Ind. App. 633, 46 N. E. 154 (1897);

Pacific Express Co. v. Walters, 42 Tex. Civ. App. 355, 93 S. W. 496 (1906);

Stein v. Kooperstein, 52 Misc. 481, 102 N. Y. S. 578 (1907);

Bassett v. French, 10 Misc. 672, 31 N. Y. S. 667 (1895).

The reasoning of the cases holding as above stated is based upon the proposition that where the employee's suit comes to trial before the expiration of the contract term it is impossible to determine with any degree of precision the amount of damages to which the plaintiff is entitled, *unless such damages be limited to the time of trial.* The future is subject to so many contingencies that to award prospective damages for a period subsequent to the trial, would, in many cases, penalize the defendant. The amount of the earnings of the plaintiff during the future period which should go in mitigation of the damages would be either impossible of ascertainment, or a matter very largely of conjecture. It may very well happen in the present case that the plaintiff, who has received a judgment for his contract compensation *for the entire unexpired term of his contract subsequent to his discharge,* without any diminution on account of moneys that the plaintiff may earn after the date of the judgment, will secure a position equally as good as that contemplated by his contract with the defendant, and will, in such event, be recovering practically a double salary during the period of such employment up to the end of the contract term. In all human probability the plaintiff will during the

two-year period to ensue after his discharge, to the end of the contract term secure a position equal in dignity and salary to that contemplated by his contract with defendant or, at least, will secure a position of dignity and monetary value. If he does so, moneys which he so earns, and which should go in diminution of defendant's liability, will not have been credited to the defendant.

In *Alaska Fish & Lumber Co. v. Chase,* 128 Fed. 886 (C. C. A. 9th, 1904), this court reversed a judgment in favor of plaintiff in a suit for wrongful discharge, for the reason that the court's instructions were such as precluded the jury from mitigating the damages to the extent of the money which the plaintiff might have earned if he had made any reasonable or bona fide effort to obtain other employment.

The plaintiff had the right to wait until the contract term had fully expired and then institute suit for his alleged wrongful discharge, in which event the measure of his damages would have been the loss suffered by him throughout the term of the contract subsequent to the date of his discharge. On the other hand, the plaintiff had the right to commence the suit immediately upon his discharge. We submit, however, that having elected to take the latter course, the plaintiff should be restricted in his damages to the loss suffered by him up to the time of trial, and that the court erred in allowing to the plaintiff prospective damages covering the period subsequent to the trial to the end of the contract term.

B. The court erred in making no allowance for the moneys which might have been earned by the plaintiff up to the time of the trial, or which might thereafter be earned during the unexpired portion of the contract term.

Upon the trial it developed that the plaintiff, since his discharge, had earned the sum of $50 and no more. This sum was taken into account by the court in the judgment which it awarded the plaintiff. Plaintiff testified, in addition, that he had made numerous efforts to secure employment without success "for the reason that men of my [plaintiff's] grade and capacity are not engaged out here" (in the Orient) (R. 252). The plaintiff further testified along this line as follows: 253):

> "Q. What do you mean by that, men of your capacity?
>
> A. Heads of departments are not engaged here by any firms of any standing.
>
> Q. You mean they are sent out from home?
>
> A. Yes, sir. People of my position, as chief accountants, are not employed here. I have letters to that effect. Standard Oil Co. told me that and Stevenson & Carlson, certified accountants, also told me. I had a letter from Mr. Stevenson—
>
> Q. The last witness said the Asia Bank and the Grace China Co.—
>
> A. I called in both these places and they didn't want a man in my position and requirements. I would want at least $500.00 a month. A position of book-keeping, yes. I could get many a position as book-keeper, but not as a chief accountant. Lots of positions as book-keepers are vacant here" (R. 253).

The court held that the plaintiff was not obliged to accept employment as a bookkeeper or any other *subordinate* position, for the reason that such employment

"would cause him to lose standing as an accountant" and affect seriously his own future career (R. 159). It appeared that the plaintiff was an accountant of more than twenty years' experience, and his position was that at his age he did not think that he was called upon to "take any position less than chief accountant"; further, that no such position *was* available in the Orient, and *would not be* available, since all firms of consequence sent their chief accountants from their home offices. It is clear, then, that if the plaintiff remains in the Orient during the two years remaining of his contract term *he will not be able to secure a position as chief accountant,* and if not called upon to accept a position of lesser dignity the plaintiff will remain in idleness in the Orient during the remainder of his contract term without making any effort to mitigate the damages of the defendant. Plaintiff, of course, was not obliged to remain in the Orient. With his experience, if he went *elsewhere,* he could, in all probability, secure employment *as a chief accountant.* The plaintiff testified, however, that he had no plans to return to the United States after the conclusion of the trial; that he had not decided what he would do (R. 255).

The testimony of the plaintiff and the conclusion of the trial court give rise to two questions which may be stated as follows:

(1) Can a plaintiff, engaged as *chief accountant* for a defendant, upon his discharge by the defendant, refuse to accept any employment of lesser grade or dignity than that of *chief accountant,* when there are numerous other subordinate positions in the same general

line of activity, and particularly when he knows and asserts that *there never will be a position of chief accountant available?*

(2) If the plaintiff can, by returning to the United States, obtain a position of chief accountant which he could never obtain in the Orient, should the trial court have taken that fact into consideration in estimating the damages against the defendant?

As previously pointed out, this court in *Alaska Fish & Lumber Co. v. Chase,* 128 Fed. 886 (C. C. A. 9th, 1904), reversed a judgment in favor of plaintiff in a suit for wrongful discharge upon the ground that the court's instructions were such as precluded the jury from mitigating the damages of the defendant by the amount which the plaintiff might have earned in other employment, if he had made any reasonable or bona fide effort to secure such employment.

Keeping in mind that the suit in the present case was commenced *two years before the expiration of the three-year term specified in plaintiff's contract,* it is *inconceivable* that the plaintiff could not with reasonable diligence secure employment somewhere *as a chief accountant,* during the two-year period, and thus minimize the damage of the defendant. We submit, however, that the plaintiff was not entitled to remain in the Orient, where, according to his own testimony, there would be no opportunity of securing employment as a "chief accountant", and refuse to accept *any other employment* which would mitigate the damages of the defendant. The plaintiff's position and the court's con-

clusion was that plaintiff was not required to accept any subordinate position which, by demeaning the plaintiff, might injure his future earning capacity. We do not contend that the plaintiff was required to take any *menial* position. Furthermore, we concede that the plaintiff was entitled to take *a reasonable time* to secure a position as "chief accountant", and that he could not, *for a reasonable time* after his discharge be required to take any position of lesser dignity than that of "chief accountant". We contend, however, that when it became apparent to the plaintiff *that he could not secure a position as "chief accountant" in the Orient* he was required to accept *any other employment for which he was fitted;* he could not remain in idleness at the expense of the defendant. The true rule in our opinion is that expressed in

> *Kramer v. Wolf Cigar Stores Co.,* 99 Tex. 597, 91 S. W. 775 (1906).

This was a suit for wrongful termination of a contract. The plaintiff had been the manager of a cigar store in Texas for the defendant. Subsequently the store of which the plaintiff was manager was merged with another store, for which reason plaintiff's contract was terminated. The defendant, however, offered the plaintiff employment in another store, *but in a subordinate position.* This the plaintiff declined to accept. Said the court (p. 777):

> "The evidence indicates that plaintiff made no effort to secure any other employment after his discharge and before he went into business for himself, for the reason, as he states, that he knew that

the attempt to secure employment of the same character as that which he had of defendant would be useless, as there were none such open in Dallas.''

The situation, therefore, was precisely the same as that in the case at bar. The plaintiff in the Texas case, was unable to secure other employment as manager of a cigar store *because there were no such positions available in Dallas.* In the case at bar the plaintiff could not secure a position as chief accountant in Shanghai because there were no such places available. Dealing with such a situation, the Texas court said (p. 777):

> ''If by reasonable diligence and within a reasonable time he could have secured another position of substantially the same character and grade as that which he had held with defendant, such amount as he could have earned therein during the entire term of service should be deducted from the contract price. If it is true, as he claims, that he could not thus have secured such a position, *and he knew that fact from the time of his discharge,* then, under the second rule laid down in the case referred to, it became his duty to use reasonable diligence to secure other employment for which he was fitted, and, in that case, the amount he should have earned in this way during the term of service should be the deduction.''

The court cites in support of its conclusion the earlier case of

Simon v. Allen, 76 Tex. 399, 13 S. W. 296 (1890).

Upon the reversal of the case a second trial was had which resulted in a judgment in favor of the plaintiff for $1076.50. The defendant appealed but the judgment was affirmed.

See:

Wolf Cigar Stores v. Kramer, 50 Tex. Civ. App. 411, 109 S. W. 990 (1908).

As appears from the opinion upon the second appeal, the plaintiff, after his discharge by defendant, was unable to secure employment "in a like or similar capacity to that in which he was employed by" the defendant as its manager. The plaintiff had had considerable experience as a bookkeeper, however, and after his discharge he could have secured employment as a bookkeeper at $75 per month. He refused to accept such employment. The court in its opinion deals with the effect of plaintiff's opportunity to secure employment as a bookkeeper. Said the court (p. 994):

> "A discharged employe cannot sit idly about during the contract period and recoup in damages, but the law imposes upon him certain obligations with reference to minimizing the damage that he has sustained: First, it becomes his duty to use reasonable diligence to secure another position of substantially the same character and grade as that which he had held with defendant. If within a reasonable time such a position cannot be secured, it then becomes his duty to use reasonable diligence to secure other employment for which he is fitted, and in either case the amount which he should have earned in this way during the term of service should be deducted from the damages resulting from the breach of the contract. The evidence shows that appellee could not have secured employment of the same character and grade as that he had with the appellant, because there was no opening for the same in Dallas. Appellee could have secured employment as a bookkeeper, for which position he was fitted, at a salary of $75 per month. Had he remained idle during the remainder

> of his contract period with appellant, this amount would have been the sum to be deducted from his recovery."

See also

> *Texas Life Ins. Co. v. Roberts,* 55 Tex. Civ. App. 217, 119 S. W. 926 (1909).

In the case at bar the plaintiff knew from the beginning that he could not secure a position as chief accountant in Shanghai. The reason he gave was that all concerns of any standing had their "chief accountants" and other heads of departments sent on from their home offices. Plaintiff therefore could not wait in Shanghai during the entire unexpired term of his contract, knowing full well that he could never secure a position as "chief accountant" there, and thus remain in idleness at the expense of the defendant. Inasmuch as the plaintiff knew from the time of the termination of his contract, or learned shortly thereafter, that he could not obtain a position as chief accountant in Shanghai, it was his duty, *if he intended to remain there,*

> "to secure other employment for which he was fitted, and, in that case, the amount he should have earned in this way during the term of service should be the deduction",

to which the defendant was entitled in mitigation of damages. Plaintiff admitted that there were numerous positions as *bookkeeper* available in Shanghai, and under the circumstances we submit that the defendant was entitled to a diminution of the damages to the extent of any moneys that the plaintiff might have earned as a bookkeeper in Shanghai during the un-

expired term of the contract. We are not here dealing with a case where a party was claiming a reasonable time within which to secure employment of the character and grade fixed in his contract. The plaintiff testifies that it would have been impossible *at any time* during the contract term to secure such employment, because places of such dignity were filled from the home offices of responsible concerns. Plaintiff, knew that it was impossible to secure employment of the character and grade specified in the contract and it became his duty "to secure other employment for which he was fitted", and thereby minimize the damage of the defendant. In holding that the plaintiff was not required so to do, we submit that the trial court erred.

In *Buffalo Bayou Co. v. Lorentz,* 177 S. W. 1183 (Tex. Civ. App. 1915), the syllabus, which is a true index to the holding of the opinion, reads as follows:

> "A servant, wrongfully discharged, after a reasonable time has elapsed, during which he has endeavored to secure the same grade of employment, must accept such employment as he can obtain to mitigate damages."

The rule upon which the plaintiff and the trial court relied in the present case, and the limitation of that rule, are well stated in the opinion. Said the court (p. 1184):

> "It is our opinion that the appellant had no right after Lorentz had been discharged from his position as captain to force him to accept a disrating and an inferior position at a lower salary than that provided for in his contract of employment; and, when he was offered such lower salary and inferior position he was under no obligation under his con-

tract to accept same in order to mitigate the damages. And, applying the rule thus laid down by Judge Henry in Simon v. Allen, supra, *he would have had a reasonable time to have sought other employment of the same grade before he would have had to accept a different or lower grade employment.* This time Lorentz did not have, for the offer of the different employment was made at the same time he was discharged. He testified that he did make an effort to get other employment and failed. The law does not contemplate that when a contract is broken the aggrieved party shall humiliate himself at once by accepting a lower grade of employment in this instance any more than in the case of the premiere danseuse, who, it was held, could not be forced under her contract of employment as a dancer in the first row, or leading lady, to accept a disrating where she would be placed in the rear rank of the ballet, thus concealing rather than displaying her charms. *Of course, after a reasonable time had elapsed during which an effort had been made to secure the same grade of employment, appellee would have been required to accept such employment as he could perform in order to mitigate the damages.*''

We may concede then, that the plaintiff was not obligated to accept a position as bookkeeper in Shanghai or any other subordinate position until he had waited *a reasonable time* in an effort to secure a position of equal dignity to that specified in his contract, i. e., a position as ''chief accountant'' or head of a department. As soon as he learned, however, that it was fruitless to seek a position of equal dignity in Shanghai, because the heads of departments were always sent from the home offices of firms of standing, *it became the plaintiff's duty to accept any employment for which he was fitted.* Plaintiff knew by the time of the trial that he could

not remain in Shanghai and secure any employment of equal dignity to that specified in his contract. Under these circumstances he was obligated to secure other employment to which he was fitted,—a bookkeeping position or a position involving the same general duties, —and the defendant was entitled to a diminution of damages to the extent of the moneys that the plaintiff might have earned in such subordinate position for the balance of the contract term. In failing to make such a deduction we submit that the trial court erred.

If the plaintiff did not wish to remain in Shanghai and there accept a *subordinate* position when he could not obtain a position as "chief accountant", he should have gone to some place where he could have obtained a position as chief accountant. With his qualifications there is no doubt but that if he had returned to the United States the plaintiff would have been able to obtain a position as "chief accountant". Under these circumstances he was not entitled to remain in Shanghai, where there was no possibility of obtaining a position of like or commensurate dignity, and where he refused to accept a subordinate position. Plaintiff was not entitled to capitalize his dignity at the expense of the defendant. He was required to accept a subordinate position in Shanghai (when he found he could not there obtain a more dignified position) or to go elsewhere where he could secure a position befitting his dignity and attainments.

VI.

THE COURT ERRED IN FAILING TO DEDUCT FROM THE AMOUNT OF THE JUDGMENT THE ITEM OF $507 (MEX.), ADMITTEDLY DUE FROM THE PLAINTIFF TO THE DEFENDANT.

The judgment in favor of the plaintiff did not take into account the sum of $507 (Mex.) admittedly due from the plaintiff to the defendant. The failure of the court so to do is the subject-matter of Assignment of Error Number Sixteen, at page 30 supra. That this sum is admittedly due from the plaintiff to defendant appears from the statement of account prepared by the plaintiff appearing in the record at pages 57 and 58. In the deductions there listed is an item of debit yen 545.21 (amounting to Mex. $507). This amount, admittedly due from the plaintiff to the defendant, of course, should have been deducted from the amount awarded to the plaintiff. The judgment in failing to make the deduction is to that extent erroneous.

CONCLUSION.

For the many reasons hereinbefore set forth, we respectfully submit that the judgment of the trial court should be reversed.

Dated, February 11, 1921.

Respectfully submitted,

FLEMING, DAVIES & BRYAN,

GARRET W. MCENERNEY,

Attorneys for Plaintiff in Error.

(APPENDIX FOLLOWS.)

Appendix.

APPENDIX.

In the United States Court for China

United States ex rel.,

vs.

Paul McCrae, Acting Clerk of the United States Court for China,

Respondent.

(Cause No. 586; filed June 9, 1917.)

LOBINGIER, J.:

This is an application for a writ of *mandamus* to compel the Acting Clerk of this Court to file and record certain articles of a proposed corporation "to carry on the business of banking in all its branches" and for various other objects therein declared. The articles are tendered under the Act of Congress[1] of March 2, 1904, and the respondent alleges that this "is not now in force and effect within the jurisdiction of the United States Court for China". It is conceded that said Act was once in force here, but it is contended that because Congress, about a decade later, in organizing the territory of Alaska, provided that

> "all laws in force in Alaska shall continue in full force and effect until altered, amended, or repealed by Congress or by the legislature,"[2]

1. 32 U. S. Stats. at Large, Ch. 978, pp. 947-952.
2. Act of Aug. 24, 1912, 37 U. S. Stats. at Large, Pt. I, Ch. 387, sec. 3.

and because said legislature did enact a new corporation law effective January 2, 1914, the Act of March 2, 1903, thereby ceased to be operative in China.

We have not at hand an official copy of the territorial statute just mentioned and the copy furnished[3] fails to disclose a repealing clause. For aught that appears the said statute may be merely cumulative to the Act of Congress of 1903, just as the latter was itself cumulative to the corporation laws of Oregon which had previously been extended to Alaska and which, it was held,[4] continued in force despite the corporate legislation of Congress above referred to.

But, assuming that the legislature of Alaska *did* attempt to repeal the Act of Congress of March 2, 1903, we are of the opinion that such attempt was ineffectual so far as this jurisdiction is concerned. For in the first place the Federal Constitution[5] provides that "all legislative powers herein granted shall be vested in a Congress", and the courts hold that power so vested cannot be delegated to another body.[6] This attempt to confer on a territorial legislature the power to repeal Acts of Congress is a recent departure, never having been made, so far as we are able to ascertain, except in this organic act of Alaska and in the more recent statute extending local self government to the Philippines.[7] It is a departure which has not yet been sanc-

3. Synopsis of Laws (1916) 20-22.
4. Alaska Gold Mining Co. v. Ebner, 2 Alaska, 611.
5. Art. I, sec. 1.
6. Am. & Eng. Ency. of Law (2nd ed.) VI, 1028; Cyc. VIII, 830 and cases there cited.
7. Act of August 29, 1916, 39 U. S. Stats. at Large (1915-1919), Ch. 416, secs. 6, 7, p. 547.

tioned by any judicial decision, which we have found, while it is contrary to the doctrine noted above and supported by numerous authorities.

But even were it permissible to delegate to a territorial legislature the power to repeal Acts of Congress for the former's own territory, this would afford no precedent for the contention here made. For if respondent's position as to this point were correct we would have the strange anomaly of Congress delegating to a territorial legislature the power not only to repeal congressional enactments operative in its own territory but also to legislate for residents of a distant region like China. This would amount to a legal and political monstrosity.

Nor is this a case where a law was passed with a provision that it should remain in force for a limited period only. The Act of Congress of March 2, 1903, contains no such provision; its duration was as unlimited as any other law. It is true that another act, passed nearly a decade later, provided that all such laws were to "continue in full force and effect until altered, amended, or repealed by Congress or by the Legislature". But this was not a repeal nor a grant of authority to repeal and it would not become effective, even as a limitation, without a delegation[8] of legislative power, which as we have seen, is contrary to elementary principles.

8. As in the Act last cited which provides:

> "That the legislative authority herein provided shall have power, when not inconsistent with this Act, by due enactment to amend, alter, modify, or repeal any law, civil or criminal, continued in force by this Act as it may from time to time see fit." (Sec. 7.)

The practice of extending over one jurisdiction laws originally passed for another, is not new in American jurisprudence. As early as 1790 the laws of Maryland and Virginia were continued in force over the respective portions of the District of Columbia which had been ceded by those states.[9] This was renewed[10] in 1801 and much of the old Maryland statute law remains in force in said District to this day as a result of such extension. In 1825 Congress extended the criminal laws of each state over all Federal territory and property located within its boundaries,[11] thus making a violation of such state law "an offense against the United States".[12] The same method was not infrequently employed during the formative period of western America when new territories were created. Thus the laws of Iowa were extended over the newly formd territory of Nebraska in 1855, while in 1884, the laws of Oregon were, as we have seen, extended over Alaska. In 1890 the Nebraska laws were extended over Oklahoma[13] organized in 1889, while the same act extended over the Indian Territory "certain general laws of * * Arkansas * * not locally inapplicable or in conflict with this act or with any law of Congress".[14] etc. These are but a few of many similar instances.

9. 1 U. S. Stats. at Large, 130.
10. 2 U. S. Stats. at Large, Ch. 15, p. 103.
11. 3 U. S. Stats. at Large, Ch. LXV, sec. 3.
12. Biddle v. U. S., 156 Fed. 759, 763.
13. Act of Congress of May 2, 1890, 26 U. S. Stats. at Large, Ch. 182, sec. 11.
14. Act of Congress of May 2, 1890, 26 U. S. Stats. at Large, Ch. 182, sec. 31. These laws were treated as Acts of Congress equally as if they had been enacted by it *in haec verba*. In re Grayson, 3 Indian Ter., 497 (1901).

Congress was both following and making precedent, therefore, in enacting, as it did in 1848, that

> "*the laws of the United States,* are hereby, so far as is necessary to execute said treaty, extended over all citizens of the United States in China (and over all others to the extent that the terms of the treaty justify or require), so far as such laws are suitable to carry said treaty into effect."[15]

In 1860 a more elaborate act[16] was passed in which the foregoing section was, almost literally, repeated, so that it affords the basis of American jurisprudence in China.

II.

Nor was the phrase "laws of the United States" a new one in our jurisprudence. It appears in the Federal Constitution (Art. VI) and as there used was construed by Chief Justice Marshall, as early as 1821, to include an act relating to the District of Columbia alone. In rejecting the contrary contention, that great jurist said:

> "Those who contend that acts of Congress, made in pursuance of this power, do not, like acts made in pursuance of other powers, bind the nation, ought to show some safe and clear rule which shall support this construction, and prove that an act of Congress, as the legislature of the Union, is not a law of the United States, and does not bind them."[17]

15. Act of Congress of August 11, 1848, 9 U. S. Stats. at Large, 276, sec. 4. "The law was passed in reference to this treaty and to that with the Ottoman Porte." Dainese v. Hale, 91 U. S. 13, 23 Law ed. 190.
16. 12 U. S. Stats. at Large, 73, sec. 4.
17. Cohens v. Virginia, 6 Wheat. (U. S.) 264, 424, 425, 5 Law. ed. 257.

In construing the statute[18] regulating appeals from the Philippines, the Supreme Court declared the Philippine Tariff Act, which applied to the archipelago alone, "a statute of the United States."[19]

It is true that the phrase "law of the United States", as used in one paragraph of section 250 of the Judicial Code relating to appeals has been construed as not including an Act of Congress for the extension of New York Avenue in Washington.[20] But the *ratio decidenti* was the declared purpose of the paragraph to *limit* appeals.[21] And it was conceded that the same phrase in another paragraph might be construed differently.[22]

In reviewing a prosecution originally brought in the United States Court for China, and in upholding that Court's jurisdiction of such a crime, the Court of Appeals for the ninth judicial circuit said:

> "It is true, there is no general statute applicable to every state in the Union, making this an offense against the United States; nor could there be, in view of the fact that under our system of

18. 36 U. S. Stats. at Large, Ch. 1369, sec. 10.

19. Gsell v. Insular Collector, 238 U. S. 93, affirming 24 Philippine, 369, which in turn affirmed the decision of Lobingier, J., reported in Philippine Law Review, I, 229-233.

20. American Security etc. Co. v. District of Columbia Comrs., 224 U. S. 491, 56 Law, ed. 856, 32 Sup. Ct. 353; Washington etc. R. Co. v. Downey, 236 U. S. 190, 59 Law. ed. 533, 35 Sup. Ct. 406; American Surety Company v. American Fruit Products Company, 238 U. S. 140, 59 Law. ed. 1238, 35 Sup. Ct. 828; American Security etc. Co. v. Rudolph, 38 App. Cas. (D. C.) 32.

21. American Security etc. Co. v. District of Columbia Comrs., 224 U. S. 491, 56 Law. ed. 856, 32 Sup. Ct. 553.

22. "Of course there is no doubt that the special Act of Congress was in one sense a law of the United States. It well may be that it would fall within the meaning of the same words in the third clause of the same section; 'Cases involving the constitutionality of any law of the United States'." Id. Cf. American Surety Company v. American Fruit Products Company, 238 U. S. 140, 50 Law, ed. 533, 35 Sup. Ct. 408.

> government the right to punish for such acts committed within the political jurisdiction of the state is reserved to the several states. But in legislating for territory over which the United States exercises exclusive legislative jurisdiction, Congress has made the act of obtaining money under false pretenses a crime. * * * In view of the legislation of Congress to which we have referred (the acts relating to Alaska and the District of Columbia, and the statute of July 7, 1898), our conclusion is that obtaining money or goods under false pretenses is an offense against the laws of the United States, within the meaning of the statute conferring jurisdiction upon the United States Court for China."[23]

This is the doctrine now regularly applied by this Court which has declared that the

> "extension results quite independently of the original purpose of the acts themselves. Thus Congress may enact a law for a limited area under its exclusive jurisdiction, such as Alaska or the District of Columbia; by its terms it may have no force whatever outside of such area; but if it is 'necessary to execute such treaties' (with China) and 'suitable to carry the same into effect', it becomes operative here by virtue of the act of 1860 above quoted. Such we understand to be the doctrine announced by the Court of Appeals."[24]

In making such extensions Congress has expressly adopted the principle that an extension by it precludes abrogation by any other body. Thus in extending over Federal territory the laws of a particular state it was provided as early as 1866 that

23. Biddle v. United States, 156 Fed. 769, 762, 763.
24. U. S. v. Allen, U. S. Court for China, Crim. No. 66.

> "no subsequent repeal of any such State law shall affect any prosecution for such offense in any court of the United States."[25]

A similar provision was embodied in an Act of 1898.[26] Nor would such express provisions appear necessary. On principle it would seem that since Congress alone may extend laws to China, it alone may withdraw them when so extended and that the act of a territorial legislature could have no effect on such laws.

III.

It is conceded, as we have seen, that the corporation act of Congress of March 2, 1903, was extended to China. But the questions involved are too important to rest upon a mere admission and we shall therefore inquire whether said act meets the requirements of the extending law above quoted—whether, in other words, it is one of the laws "necessary to execute the treaties" and "suitable to carry them into effect".

Now one of the primary objects of the treaties was the promotion of commerce. That can hardly be accomplished in these days without corporations and a law authorizing their formation would seem to be one of the laws "necessary to execute the treaties". Indeed the very desire of our citizens to incorporate in China affords the best evidence of such necessity.

Moreover this Act of March 2, 1903, is not only the latest expression of Congress on the subject of incor-

25. 14 U. S. Stats. at Large, Ch. 24, sec. 2; U. S. Rev. Stats., sec. 5391.
26. 30 U. S. Stats. at Large, Ch. 576, p. 717.

poration; it seems to us the most suitable. The legislation on that subject enacted for the District of Columbia is not only much older but seems to be confined mainly to special classes of corporations. The Act in question, however, appears to be an up to date general incorporation law. Neither the argument of this case nor a careful scrutiny of the Act itself has brought to light any feature of it which is unsuitable to conditions in China. It requires, it is true, a copy of the articles of incorporation to be filed "in the office of the Secretary of the District";[27] but in the case of extended legislation such provisions are to be construed not literally but as meaning the corresponding office, which, in China, would seem to be the Legation, since it is the only local American institution, besides this court, whose functions extend to the whole of China. In applying the Oregon statute, which required filing with the county clerk, the United States District Court for Alaska held that it would be sufficient to file with a similar official.

> "Here, then, was the officer corresponding to the county clerk, with whom the other certificate might be filed. We are of the opinion, however, that a filing of the second certificate with the clerk of the court would have met the requirement, for it is well settled that the intention of the Legislature should not be defeated by a strict construction of the statute. * * * The intention of Congress is gathered, and by following out this obvious intention the person desiring to incorporate, while not filing with an actual Sercetary of State and an actual county clerk, are substantially complying

27. Act of March 2, 1903, sec. 2.

> with the law when they file with the surveyor general and the clerk of the court for the division in which they intend to carry on business.''[28]

The chief copy, however, is required to be ''filed in the office of the clerk of the District Court''[29] and to that designation the clerk of this Court well corresponds. The incorporation is thus effected by an officer of the Court and the concern placed under its observation from the start. Each year the corporation must file with the said Clerk a list of its officers and notice of any changes therein must likewise be filed.[30] The opportunities for official supervision are, therefore, much greater than in the case of corporations formed, as many have been, under the laws of some distant state, to do business in China where no official inspection on the ground is possible.

Moreover, the conditions both preliminary to, and after, incorporation are strict. The articles are required to state full particulars,[31] all stock must be paid for ''at its true money value''[32] and ''every stockholder shall be personally liable to the creditors of the company for the amount that remains unpaid upon the par value of his stock''.[33] The capital stock must not be increased nor diminished except as prescribed by law.[34] The corporation must ''keep correct and complete books'' which must ''at all reasonable times,

28. Alaska Gold Mining Co. v. Ebner, 2 Alaska, 611, 614, 616.
29. Act of March 2, 1903, sec. 2.
30. Id. sec. 20.
31. Id. sec. 2.
32. Id. sec. 14.
33. Id.
34. Id. sec. 13.

be open to the inspection of stockholders'',[35] and every year the principal officers must prepare and publish for three successive weeks in a newspaper of general circulation in the jurisdiction a sworn statement showing

> ''(1) the number of shares of capital stock outstanding: (2) the amount paid in on each share of stock; (3) the actual paid-up capital of the corporation; (4) the actual cash value of the property of the corporation and the character, location, and nature of the same; (5) the debts and liabilities of the corporation, and for what the same were incurred and whether the same are secured or unsecured and the amount of each kind, and, if secured, the character and kind of security; (6) the salaries severally paid each and every officer, manager and superintendent of the corporation during the preceding year; and (7) the increase or decrease, if any, of the stock, the capital, and the liabilities of the corporation during the preceding year.''[36]

With the court officers ready to see that these requirements are observed the interests of both the public and the stockholders appear to be amply safeguarded. No defect or shortcoming has been pointed out in this statute, as compared with the most advanced corporation laws[37] and if Congress could, after long effort, be persuaded to enact another law, especially for this jurisdiction, it is not apparent wherein it would excel the present one. We are, therefore, of the opinion that the Act of March 2, 1903, is quite as ''necessary'' and ''suitable'' as the other ''laws of the United States'' which have been held by this and

35. Id. sec. 16.
36. Id. sec. 23.
37. Cf. the new Public Utilities Act of Illinois, discussed in Illinois Law Rev., XII, 12.

other courts to have been extended here by the general act above quoted. For there can be no half way adoption of that doctrine; it includes all such laws or none. It cannot logically be restricted to any particular class of acts. It is just as applicable to civil laws as to criminal; just as "necessary" in respect to corporations as to procedure.

IV.

But the "suitability" of this Act of March 2, 1903, depends upon its requirements and applicants for incorporation thereunder must show compliance therewith so far as compliance is possible before incorporation. *Inter alia* the act requires the articles to state "the amount of capital stock of said corporation, and how the same shall be paid in".[38] The importance of this requirement becomes apparent when read in connection with the following:

> "No corporation shall issue any of its stock, except in consideration of money, labor, or property estimated at its true money value."[39]

The object of this is evidently to insure a *bona fide* capital at the start and to prevent incorporation with merely "watered" stock. Clearly this is a wise precaution whose observance must be strictly enforced.

Examining, in the light of this requirement, the Articles here tendered we find that the applicants have stated "the amount of capital stock" but not "how the same shall be paid in". It does not appear whether

38. Id. sec. 2.
39. Id. sec. 14.

the stock has been issued (and hence the capital created) "in consideration of money, labor or property" or of something else, nor whether, if the consideration is other than money, it is "estimated at its true money value".

Moreover the articles fail to show whether the capital stock is to be paid in before incorporation or after. For aught that appears the concern might be incorporated without any tangible capital by merely issuing certificates of stock. In this case the applicants are worthy and reputable citizens and we may assume that no such result was intended. But as this is the first case where the question has arisen here we must adopt a rule which would apply to all situations and prevent incorporation by impecunious adventurers.

Again the Act provides that corporations organized thereunder

> "shall have the right to acquire and hold only such real estate as may be necessary to carry on their corporate business."[40]

We are disposed to agree with respondent's counsel that this provision is infringed by the recital, in the Articles, of the proposed corporation of an intention

> "To take, own, hold, deal in, mortgage or otherwise lien, and to lease, sell, exchange, transfer, or in any manner whatever dispose of real property wherever situated."

Now the Clerk is required to record articles only after they have been filed and the only articles which

40. Id. sec. 5.

are entitled to be filed are those which contain the particulars prescribed by the statute. Doubtless the act of filing is a ministerial rather than a judicial one, but the law seems to be well settled that the recording officer cannot be compelled by mandamus to accept for filing, papers which, on their face fail to comply with the statute.[41] And since the recording of the articles perfects the corporate existence which can then be questioned only in a direct proceeding[42] it seems to be not only the right, but the duty, of the officer to see that such existence does not commence until the conditions prescribed by the law have been fulfilled. In providing for incorporation thru the machinery of the Court, and imposing the responsibility upon its officers, the act which we are now applying seems to have been intended to prevent the evils of loose and reckless incorporation by making possible in advance a careful scrutiny and strict exaction of all prescribed conditions. This offers opportunities of supervision which would be lost if the recording officer were treated as a mere automaton, obliged to accept any corporate papers which might be presented.

Having reached a conclusion which disposes of the case before us we find it unnecessary to prolong this opinion by entering upon a consideration of the other question discussed in argument, viz., whether, under the law which we have found to be in force here, bank-

41. State v. M'Grath, 92 Mo. 355, 5 S. W. 29; Woodburg v. McClurg, 98 Miss. 831, 29 S. W. 514; People v. Nelson, 3 Lans. (N. Y.) 394.
42. Lord v. Bldg. Ass'n, 37 Md. 320, 327; Cochran v. Arnold, 58 Pa. St. 399.

ing corporations may be organized. Since a determination of that question is not necessary in order to decide the pending cause whatever we might say thereon would be *obiter dicta* and we prefer to discuss it only when the necessity for adjudication arises.

For the reason that the proposed articles of incorporation do not, in our judgment, comply with the statute, the writ of *mandamus* is

Denied.

I hereby certify that the foregoing decision of United States ex rel v. Paul McRae is a true and correct copy of said decision filed with the clerk of the United States Court for China on June 9, 1917.

Witness my signature and the official seal of the United States Court for China on this the 24th day of September, 1920.

(Seal) J. P. Connolly,
Clerk of the U. S. Court for China.